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Brief of Ronald for Appellee

IN THE

SUPREME COURT OF THE UNITED STATES

Filed October Term, 1901.

NORTHERN PACIFIC RAILWAY COMPANY,
Appellant,
vs.
J. A. SODERBEEG,
Appellee.
No. 272

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEE ON MOTION TO DISMISS AND ON THE MERITS.

J. T. RONALD,
Solicitor for Appellee.

The Metropolitan Press, Seattle.

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The motion of the appellee to dismiss this appeal having been postponed until the case is reached for hearing on the merits, appellee in addition to the matters urged in his printed argument heretofore pre-

sented in support of said motion, urges the following additional grounds for dismissing said appeal:

It is conceded by learned counsel in their answer to our argument on motion to dismiss that their sole reliance for the asking of this court to assume jurisdiction arose out of their allegations in paragraph 10 of their bill of complaint. This paragraph, briefly analyzed, alleges: "That defendant has filed a mineral location upon the premises and claims them as such for the granite thereon, and the question of whether said premises are mineral or non-mineral has not yet been determined by the land department of the United States."

In our argument on motion to dismiss we have discussed this paragraph to some extent, to which we now refer, and in addition thereto urge the following grounds for dismissal:

I.

This court will not assume jurisdiction because the question of fact as to this being mineral land has been decided by the land department and patent issued.

II.

Complainant and appellant has mistaken its remedy.

III.

The appellant, as is shown by the records, has waived any right which it may have had to make any claim to the lands in controversy.

The stipulation shows that Soderberg, being qualified to enter mineral land, and the land in controversy being unsurveyed, said Soderberg, in accordance with the *mining* laws, entered and located the "Lillie" and "Linea" mining claims. That he did the required amount of work and labor and improvements thereon to entitle him to a patent, if the same are mineral lands. That he complied with all the rules and regulations of the land department, and made the proof necessary, and it was assumed by the land department that he was entitled to a patent. That he paid for the claims, and that "patent, if not already issued, will issue in due course of time and as soon as the officers of the land department can in the regular course of business issue the same" (see transcript, pp. 30 to 32). Subsequent to the filing of the stipulation and prior to the decision in the case by the lower court, patent was issued for these lands as mineral lands, and by stipulation of the parties, such patent was filed as an exhibit in the case (See transcript, pp. 37 to 40). If this land had been applied for by Soderberg under the act of 1878 known as the Timber and Stone Act, complainant might have had better standing in court than it now has, for this

Timber and Stone Act, which was passed prior to the date of definite location of the railroad, provides for the entry of lands valuable for *stone*, and *unfit for cultivation*. Application to purchase under this act may not have been in fact a mineral application, although the stone may be mineral. But the application in this case, it is conceded, was a mineral application, and the dispute as to whether the land was mineral or not has been submitted to the Land Department and by that department decided to be mineral land. This court has decided in numerous instances that this question of fact decided by the Land Department is conclusive upon this court. If by reason of a misconstruction by the Land Department of an act, land to which the complainant or appellant is entitled has been patented to the appellee, then the remedy would be an action to declare the appellee a trustee and to require a conveyance of the land to the appellant.

And this brings us to our second additional ground for dismissing this action, namely, that appellant has mistaken its remedy.

II.

The only relief sought by the bill of complaint in this action is to enjoin the defendant from removing any of the granite, and to require him to account to the complainant for any and all granite theretofore sold. It is not an action to decree the defendant a trustee of the land for the railroad company, and we

submit that the only way in which the complainant can now recover the land in question is by showing that the Land Department, by a mistake and misconstruction of the law, patented to Soderberg lands to which complainant was entitled. Counsel may contend that the burden of their argument in this case is to show such misconstruction of the Land Department, but we submit that where the record shows, as it does in this case, that the claim of the defendant is based upon a mineral application and that the character of this land as mineral has been determined by the Land Department, that this question as to whether or not as a fact it is or is not mineral, is conclusive upon this court; that the question of misconstruction or mistake of the Land Department is not an issue in this particular action; that this is a collateral attack upon the patent, or, to state the question with greater particularity: Here is an action to restrain defendant from removing and selling any granite from lands claimed by the railroad company, and to require the defendant to account to the railroad company for granite theretofore removed and sold. That is the theory of the complainant's suit. The defendant shows that he is acting under a mineral patent; the complainant collaterally attacks this patent by alleging its issuance to have been the result of misconstruction or mistake of the Land Department. We submit that if the patent is to be thus attacked it must be attacked directly and in an action for that purpose upon the

theory and based upon the ground that the patent is void by reason of such mistake or misconstruction of the Land Department.

III.

Now, our third proposition that the railroad company have waived any right to assert any claim it may have had, is based upon the fact that the railroad company failed to adverse Soderberg's application for a patent. We think it has no standing in court now. The stipulation shows that the application was duly made and notice duly given; that the complainant made no appearance, objection, contest nor filed any adverse claim. The railroad company cannot now be allowed to contest this matter unless it be by an action directly to set aside the patent for mistake or misconstruction. Failure to file an adverse claim is fatal in this form of an action.

See Barringer & Adams on the Law of Mines and Mining in the United States, pp. 382 to 388, 394, 415, 416;

N. P. R. R. Co. v. Cannon, 54 Fed. 257;
Seymour v. Fisher, 16 Colo. 188;
Dahl v. Raunheim, 132 U. S. 260.

Wherefore, appellee respectfully submits that the appeal herein should be dismissed.

J. T. RONALD,
Solicitor for Appellee.

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NORTHERN PACIFIC RAILWAY COMPANY,

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Appellee.

No. 273

BRIEF ON THE MERITS.

STATEMENT.

The facts in this case are set forth in the stipulation (transcript, pp. 24 to 33).

ARGUMENT.

The learned counsel for appellant are not quite accurate in the statement of the question involved in this case to be "whether land containing a granite quarry is mineral within the true meaning of the

Northern Pacific grant, so as not to pass thereby." The proposition involved is more accurately stated by the Circuit Court of Appeals from which this appeal is pending, to be "whether land which is chiefly valuable for granite of a good merchantable quality is mineral land within the meaning of the exception from the grant of lands to the Northern Pacific Railroad Company" (transcript, p. 53). Appellee claims only a very small fraction of a quarter section. We do not claim that the mere existence of some granite on a quarter section, *per se*, will make the whole quarter mineral land, but is the particular small area in question in controversy in this case more valuable for its granite than for any other purpose? It is stipulated (transcript, p. 30) that the principal value of these claims consists in a ledge of granite running through them of a good and merchantable quality, valuable for building stone, capable of being quarried and of the value of more than five thousand dollars. (We note here parenthetically that the use of the word "ledge" is hardly applicable to a granite formation, it being more in the nature of regular or irregular stratified rock, but this does not affect the merits of this case).

Section 3 of the act of July 2nd, 1864, grants to the railroad odd numbered sections, *not mineral*, on the line of the road, to which the United States have full title, *not reserved, or otherwise appropriated, and free*

from other claims or rights, at the time the line of said road is definitely fixed, and the plat thereof filed in the general land office. It provides further, that if prior to said definite location, any part of said land shall have been *reserved or otherwise disposed of,* the company may select other lands in lieu thereof.

There is a proviso in such section that "all mineral lands" are excluded from the grant, and in lieu thereof a like quantity of agricultural lands may be selected by the company. The word "minerals" shall not be held to include iron or coal. Congress reserved the right at any time to add to, alter, amend or repeal the act.

This act excludes two classes of land, which are within the limits of the grant—First, mineral land; and second, land which Congress, in the meantime, and prior to definite location, shall have reserved, or otherwise appropriated, or which, at date of definite location, might not be free from other claims or rights.

It will be observed, therefore, that Congress reserved the right for any purpose and at any time prior to the definite fixing of the line of the road to reserve, or otherwise appropriate, or make enterable or subject to claims or rights under other laws, such lands within the limits of the grant as it might see fit, whether mineral or not mineral, and for such lands as

might thus be reserved, or otherwise appropriated or be subject to other claims or rights at the date of definite location of the road the company should have the right to select lieu lands. These lieu lands were to be *agricultural* lands. We emphasize the word "*agricultural*" for the reason that it appears to evidence the intention of Congress that only agricultural lands are to be granted to the railroad companies. Hence, we maintain the railroad has no right to this land by reason of two propositions:

I.

It is included within the exception of mineral lands.

II.

If, however, it should be held not to be "mineral land" within the meaning placed by Congress on this term in the granting act, still subsequently to the granting act, and prior to the definite fixing of the line of road, this character of land was *reserved* or *otherwise appropriated* by Congress, and therefore at the date of the definite fixing of the line of road, it was not free from, but subject to, other claims or rights, and did not pass when the grant took effect.

Counsel admit that the word "mineral" alone has a broad and well defined meaning, but contend that when used as a word qualifying "land" it has a very contracted meaning.

While admitting what are mineral substances, they deny that land containing most of these mineral substances is "mineral land." The land may have no value except for these numerous substances admitted to be mineral, yet, according to counsel some tracts may abound in gypsum, alum, nitrate of soda, phosphate, petroleum; others may be completely covered with strata of sandstone, limestone, granite, marble, or with mines of opals or diamonds, all conceded to be minerals, yet such land is not "mineral land." That these words in the reservation clause of this grant are used to designate only lands abounding in gold, silver, copper, cinnabar or lead. In short, counsel advance the anomalous doctrine that, not all lands valuable chiefly for well recognized, useful and commercial mineral substances are mineral lands; that while Congress reserved "mineral lands" from the grant it did not mean lands valuable chiefly for all useful and commercial mineral substances, but such as were valuable only for a few of the rarest minerals.

In other words, that while Congress reserves "mineral lands," it left the meshes in the bottom of the reservation screen large enough to permit passage through to the company of all mineral lands except only gold, silver, copper or lead lands.

Counsel state in their brief (page 7) that it is made clear by a review of the legislation by Congress that

"in no case are non-metal bearing rocks mentioned as 'mineral,' and the laws bear evidence that Congress did not intend to include all common rocks of the country when legislating touching minerals."

We digress here so far as to state with the utmost respect, that we think the learned counsel beg the question by this statement. For the purpose of this case it is not material whether mere "non-metal bearing rocks are mentioned as mineral" or whether Congress did or "did not intend to include the *common rocks* when legislating touching minerals." The material question here is whether large deposits or strata of granite of conceded great commercial value for building and ornamental purposes is mineral in character; and we reply further to the statement of counsel above quoted that the review of the legislation fails to furnish even a hint that Congress ever intended to exclude granite or any other well-recognized, useful and commercial mineral substance from the list of minerals. The learned counsel set forth (pages 8 to 10) a partial list of the acts of Congress relating to the subject. Because, in the earliest acts of Congress providing for a sale of public lands in certain regions it reserved "one-third parts of all gold, silver, lead and copper mines" for future disposal by Congress, counsel argue that this evidences the policy of Congress, thus early, to reserve only gold, silver, copper and lead lands.

We answer, if this be considered as evidence of the future policy of Congress, that it shows the policy to be to reserve only "one-third part of all such lands;" therefore if Congress, in the several grants to the Pacific railroads, departed from this policy in so far as to reserve the whole of such lands we may, with equal force, infer the intent of Congress to go further and reserve the whole of all minerals. One is no greater departure than the other. Furthermore, these earlier enactments, with equal force, evidence the policy of the government to *lease* mineral lands. The truth is, the only minerals understood to exist within the regions covered by these earlier acts were copper and lead, with the probability that gold and silver might be found in limited quantities; and Congress, by reserving every mineral of a commercial value supposed to exist therein, plainly evinced its policy to be not to part with any such minerals. This is so declared by the present Secretary of the Interior, and in the decisions of this court to be hereafter noticed.

The fact that only gold, silver, lead and copper were specifically named in these earlier enactments is not evidence of the policy of Congress not to reserve other minerals, but is evidence that Congress did not know of the existence of any other minerals. This conclusion is supported and strengthened by further examination of the acts of Congress following these earlier enactments. Gradually as the region became peopled, and as Congress became more acquainted

with the resources of the new country, or possessed of knowledge of the existence of any new substance of the mineral kingdom of a commercial value, it enlarged its further reservation by including such newly discovered substances.

This is clearly shown by the review in question. Following the ordinance of the old Confederation of 1785 cited by counsel, the next act was May 18, 1796 (1 Stat., 464), which is the basis of our present rectangular system of surveys. That act required every surveyor to note in his field book the true situation of all mines, salt licks, and salt springs; and reserves for the future disposal of the United States every salt spring to be discovered. This did not refer to open mines only, for this court in *Morton v. Nebraska,* 21 Wall. 675, in referring to this particular act, recognized that the word "mines" there used referred to open as well as hidden mines. The next act following the one of April 16, 1800, cited by counsel, was the act of March 3, 1803 (2 Stat., 235) appropriating money to establish salt works at the salt springs near the Wabash river and authorizing the president to work or lease the spring. It was this act that inaugurated the policy of the United States of leasing mineral lands instead of the act of March 3, 1807, as cited by counsel. Next came the act of March 26, 1804, (2 Stat., 277), providing for the disposal of public lands in Indiana Territory and reserving all salt springs together with sufficient contiguous territory for future disposal by the

United States. The next act was of March 3, 1805, (2 Stat., 343), for sale of lands in Ohio, reserving all salt springs for future disposal, etc., and the next act of April 21, 1806, (2 Stat., 391, Sec. 11), for sale of lands in Territory of Orleans, reserves all salt springs, etc., for future disposal. Further acts not cited by counsel to the same effect are act of February 29, 1808, (2 Stat., 470); act of March 3, 1811, (2 Stat., 663), and act of February 5, 1813, (2 Stat., 797).

The above acts, together with the acts cited by appellant (on page 8 of its brief), it is believed, comprise practically all of the legislation of Congress on the subject prior to the pre-emption act of 1841. Now, some of the substances reserved in these later acts of Congress were not mentioned in the earlier acts, and it could be argued with as much force of reasoning as counsel argued in this case, that Congress had no right to reserve in the later acts substances not mentioned in its former acts. There are many kinds and classes of minerals, metallic and non-metallic, in this country not specially enumerated in any act heretofore passed by Congress, many of which we feel sure counsel will concede, notwithstanding no special mention has ever been made of them, are minerals. The following is a partial list of the more important minerals and metals found in this country which possess commercial value, divided with reference to their metallic and non-metallic character, and though *some* of which are found in leads, lodes, or veins, yet *all* of which are found in

deposits, either in regular or irregular stratified rocks:

METALLIC—Aluminum, antimony, arsenic, bismuth, chromium, cobalt, copper, gold, iron, lead, manganese, mercury, nickel, platinum, silver, tin, tungsten, zinc.

NON-METALLIC—Alum, asbestos, asphalt, with its kindred minerals resulting from oxygenization, such as albertite, grahamite, gilsonite, a valuable mineral found in Colorado and Utah, ozokarite; barytum, or heavy spar; bauxite, a stratified mineral rapidly assuming a commercial importance from the fact that it is from this that the pure alums of commerce are manufactured, and it is also practically the only ore from which aluminum is obtained; borax; bromine; building stone, consisting of sandstone, granite, marble and travertine, the latter being a most valuable stone with which the city of Paris is very largely built; calc-spar for fluxing; cement; chromic iron ore; clay deposits, consisting of brick clay, fire clay, and a still purer deposit called kaolin, for making pottery; coal, whether anthracite coal, bituminous coal, or lignite coal; corundum, (or emery); dolomite, a magnesian limestone, for the conversion of which into a hydraulic cement expensive manufactories are now being constructed in our own state; feldspar, with its kindred minerals; flint; fuller's earth; fluor-spar, which for certain purposes is the best available flux known; graphite;

guano; gypsum; infusorial earth; iodine, a mineral substance commanding a very high price; limestone; marls, marbles, etc.; mica; mineral paints; mineral waters; monazite; natural gas; nitrate of soda; petroleum; phosphate rock; potash; precious stones, such as diamonds, emeralds, opals, rubies and sapphires, etc., and found in dykes or intermingled with ledge matter; pyrites; rutile; salt; silica or quartz, comprising agate, chalcedony, both of which are mined and shipped for commercial purposes; also silica or quartz for making glass; soapstone; sulphur; talc.

Now, if the exception in the grant to the railroad company be only of lands bearing precious metals, then the exception would be limited only to lands bearing gold and silver, (Webster's Dictionary). If the early act of Congress specifying gold, silver, lead and copper only evidences the intention to exempt no other minerals, then all of the other metallic minerals as well as non-metallic minerals, above enumerated pass to the railroad company by the grant, no matter how rich the land may be in such metals or minerals. Suppose that before patent shall issue to the Northern Pacific Railway Company for any of the lands covered by this grant, some portion of them may be found to abound in mines rich in any of the above mentioned metals or minerals, or, which is the case now in the State of Washington, rich in molybdenum, a metal not named above, but necessary in the making of

armor plate, and selling at the present time at one thousand dollars a ton F. O. B. cars, would counsel argue that because this substance was not of the precious metals and was not specifically mentioned in any past reservation of Congress, that therefore the lands containing them are not mineral lands, and pass to the railroad company?

A circular issued November 1, 1901, from the Division of Mining and Mineral Resources, Department of the Interior, compiled under the supervision of David T. Day, Chief of Division, over the signature of Charles D. Walcott, director, showing the mineral products of commercial value of the United States for twenty calendar years, includes each and every one of the above mentioned metallic and non-metallic substances. This has a most significant bearing upon the question in this case. We note that for the four years preceding the date of definite location of this company's right of way the total value of the products of the above mentioned non-metallic minerals exceeded $845,000,000, and that the output has increased yearly, amounting to $550,000,000 for the year 1900, and shows a total for the sixteen years since the definite location of this right of way of over $5,300,000,000 in value. With the exception of the years 1880, 1899 and 1900, the annual ouput of these non-metallic products exceeded the annual output of all the metallic products of the United States. This circular shows

a total value of these non-metallic mineral products, *excluding the value of all coal mined in the United States,* to be in excess of $1,270,000,000 during the past *ten* years only. When we consider that the bulk of these non-metallic products has come from that part of the United States covered by the Pacific railroad grants, and that only a small part of the coal deducted has come from the same territory, the above figures are seen to be far below the real value of the non-metallic mineral products of this territory other than coal during said ten years. Is it not almost unpatriotic to suppose for a moment that Congress ever intended to grant to any private corporation or corporations minerals of such vast value?

We think the statement of the proposition carries its own refutation. The truth is, every succeeding act of Congress containing a reservation at all included in such reservation, either by name or by a generic term, every newly discovered mineral not mentioned in the preceding reservations, and if this course evidence any settled policy of the government at all, it evinces the policy of reserving all minerals of any and every character of a commercial value, where they exist in quantities sufficient to make the land more valuable for that particular substance than for agricultural purposes.

Prior to the Pre-emption Law of 1841 there was no general law for the disposal of public land. All prior

disposals had been under special acts for the purpose, each succeeding enactment broadening the reservation clause so as to include such minerals as were not known to exist, hence, not included in last preceding reservation. The Pre-emption Act excepted "salines or mines." We think the word "mines" is here used in a generic sense to include all valuable mineral substances "open as well as hidden," as stated in *Morton vs. Nebraska, supra.*

Counsel refer to a number of statutes relative to Michigan and Wisconsin, where copper and lead lands are referred to as "mineral lands," and argue from this the interpretation of Congress limiting the meaning of mineral lands to lands containing only these metals. We concede them to be mineral lands and Congress correctly designated them, but they are not the only mineral lands.

We might suggest here that prior to the acquisition of California, we had practically no gold bearing lands, but with the expanding of our boundaries across the huge mountain regions to the Pacific and the discovery of gold, with the consequent migration of our people, and exploration of the country, Congress began to have a hint of the vast and varied mineral resources of the country; that minerals of all kinds, both known and unknown, probably abounded in these mountain regions; consequently, we note a change (if not in policy) then in the custom of Con-

gress in its future enactments with reference to its reservation clauses, for, commencing with 1850, Congress appears to have abandoned the idea of using specific words to designate specific minerals in its reservation clauses, and adopts the generic term "mineral lands." (See the acts set forth and reviewed in appellant's brief, and in this brief).

We think it is fair to conclude that Congress, realizing that it was unsafe to reserve certain classes by special designation, concluded it wiser to use the one generic term "mineral lands" in order that all mineral lands should be included unless especially excepted from the reservation clause, as was the case in the Pacific railroad grants, where they used this generic term, which reserved all minerals excepting certain substances such as coal and iron, which were especially excepted from the reservation.

These earlier acts show the policy of Congress to be that as fast as exploration discovered a new substance it was included in the next reservation; and even assuming that Congress did know of its existence, but failed to reserve it, with the intention that it should pass in any particular instance, it does not follow that Congress did not intend it to be included in the designation "mineral land" later. The mere fact that a substance is not excluded *eo nomine* in one act, does not, *per se*, prove that it is not included in its generic term subsequently used. The burden of coun-

sel's argument seems to be that Congress always referred to land containing precious metals as mineral lands, and therefore no lands are mineral lands unless they contain these precious metals. This conclusion is not deducible from the premises. We admit all such lands are mineral lands, but deny that all mineral lands are such lands. If Congress did not mean to include non-metallic minerals, why did it exempt coal from the grant? The exemption of this non-metallic substance shows conclusively that Congress included both metallic and non-metallic minerals.

Counsel then devote considerable space to a review of the railroad grants, and show grants in aid of sixty-one railroads where no exception or reservation of mineral lands was made, while the exception was made in but few grants, and argue that the reason no reservation was made in those wherein none was made was because the roads aided passed through non-mineral country, and the grants where reservations were made are to roads passing through a known mining country, such as the crossing of our mountain regions. This is not quite accurate; because some of the railroads where no reservation was made passed through some of the best known mining regions at the time, and known to be valuable for particular metals, such as in the Lake Superior regions, and in Michigan and Wisconsin; while in the Pacific grants the region was unknown and unexplored, and Con-

gress while exploring this vast region reserved generally all mineral lands, and also *the right to make future reservations or appropriations prior to definite location.*

Again, many of these railroad grants, where the reservation is contained, are in the same district with railroad grants where no reservation was inserted, showing therefore the reasons of counsel to be unsound. The truth appears, from an examination of the various grants, to be that a line was drawn about 1860; that prior to that time Congress granted the lands to states, and that subsequent to that time, grants with but two exceptions, were made direct to the railroad and that all such railroad grants contained a reservation by the generic term "mineral lands." Counsel say on page 15 of their brief:

"The reason for the exception of minerals in each of these acts is found in the history of the particular grant in question. As to the Pacific roads a general and sufficient reason existed, which was that all of them were to cross the mountain ranges of the west, known at the time to contain precious metals in great quantities. A large proportion of the grants to all the Pacific roads lay in mountainous country which would prove valuable mainly by its production of precious metals."

Now, if it had been the intention of Congress to reserve only the precious metals, why did not Congress expressly enumerate the metals reserved? It had, in prior acts, frequently reserved certain metals

by name. It could just as easily have done the same thing in these acts. The facts, as we contend, were that Congress, supposing these mountainous regions to be rich in mineral resources, not knowing just what minerals subsequent exploration might discover, and intending to reserve them all, whether known to exist or likely to exist, abandoned the policy of specially enumerating certain ones which might be construed to be an exclusion of all others, and used one broad generic term which included everything of mineral character of commercial value. This is further borne out by the history of the legislation furnished by counsel (page 16) to the effect that while the act was under discussion in the Senate, Senator Doolittle called attention of the Senate to the fact that some of the best iron mines of the world were within fifteen miles of Lake Superior. (Cong. Rec. First Session, 38th Cong., part 2, p. 965). He also stated that there were copper mines fifteen miles south of Lake Superior producing as high a percentage of copper as those of the peninsula of Michigan. After this announcement Senator Harlan (p. 1030) moved to amend the bill by inserting in the first section the words "not mineral," and this amendment was adopted. Now, why did Senator Harlan's amendment contain the words "not mineral?" The only mineral alleged to exist was copper and iron. If the policy of Congress was to reserve copper and iron only, or only a few of the recognized mineral sub-

stances, Congress could have said so just as easily as to use this generic term? This is just what Congress has done where it was not its intention to reserve all the minerals; for in the act of July 13, 1866 (14 Stat., 94), granting land to a railroad, it reserved only land "containing gold or silver." Again, by act March 2, 1867 (14 Stat., 548), granting land to another railroad, the reservation was of "all lands containing gold or silver or copper." Now, if it is true, as counsel assume, that Congress used the words "minerals" or "mines" or "mineral lands" as synonymous or interchangeable with "gold, silver, copper and lead," etc., then this last reservation of only "gold, silver or copper" included the other metal "lead" also. Will counsel contend for a moment that mines valuable for a lead mineral were reserved by the act last cited? They certainly will not. We here have the strongest and plainest evidence of the legislative intention, that when *all* minerals were not reserved Congress mentioned specifically what ones were reserved. Counsel say (page 17):

> "If Congress had supposed for a moment that stone land was 'mineral land,' no reason is apparent why the exception should not have been incorporated in all of the grants."

To which we reply that if Congress had intended that a substance recognized throughout the world as a mineral substance and of great commercial use and value, should *not* be excluded from its grant, it could

have excepted it *eo nomine*, as it did iron and coal. The Circuit Court of Appeals in *N. P. R. R. Co. v. Sanders*, 49 Fed., 136, speaking with reference to this subject, used the following language:

"The country at large had an interest to be subserved by the early discovery of all the mines contained in lands liable to be claimed by the plaintiff under its grant, and it is folly to suppose that if Congress had intended, contrary to the public interest, to prohibit the prospecting of a vast area of the public land through a region known to be rich in minerals, or to deprive prospectors of the right to claim and hold supposed discoveries until the truth regarding the same could be ascertained in the only practical way—that is by development—requiring time, and involving labor and the outlay of money, it would not positively have said so in plain words."

And again on page 134:

"We hold that claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the custom of miners and local regulations at and previous to the date of plaintiff's grant."

In *Barden v. N. P. R. R.*, 154 U. S. 288, the construction of this very grant came before the Supreme Court of the United States, which used the following language:

"Grants in aid of railroads before issue of patent have never been held to pass other minerals than iron or coal."

* * * * *

"When the act was passed making the grant to the plaintiff, it would have been impossible to state

with any accuracy what parts of the tract contained minerals and what did not. That fact could only be ascertained after extensive and careful exploration, and it is not reasonable to suppose that Congress would have left that important fact dependent upon the simple designation by the plaintiff of the line of its road, and the possible disclosure of minerals by the way instead of leaving it to future and special explorations for their discovery. * * * They knew that the mineral belt over which the proposed railroad was to pass was almost entirely unexplored. They, therefore, retained from their grant the mineral lands, whether known or unknown, and left the discovery of the minerals to future explorations, and their disposition to future legislation."

Hence, Congress continuously, in each appropriation bill, made appropriations for the exploration of the mineral regions and the ascertainments of the mineral resources of the country.

Later on, in the same opinion, this Court say:

"Nothing will pass to the grantee by implication or inference, unless essential to the use and enjoyment of the thing granted, and that exceptions intended for the benefit of the public are to be maintained and liberally construed."

Hence upon the ground that coal and iron were excepted from the mineral reservation, because it was essential to the use and enjoyment of the thing granted, Congress in the Tex. Pac. R. R. grant, and in all of the Pacific railroad grants provides that coal and iron are not to be construed as minerals. Evidencing the clear intention of Congress, as set forth in the

above quotation, that no minerals should pass excepting coal and iron which were essential to the enjoyment of the thing granted.

The cases cited by counsel from the Courts of California, Nevada and the United States Supreme Court are inapplicable. In some of those cases the question was whether the land contained precious metals in sufficient quantities to be called a mining claim; in others it was a controversy between agricultural and mineral claimants; but in no case was the question of the character of stone lands raised. These cases must be construed with the particular facts and issues involved.

Having now discussed generally the main contentions of appellant as we understand them from its brief, we will recur to and discuss our two propositions in the order of their statement at the beginning of this argument. During the course of this discussion we will have occasion to refer further from time to time, to the arguments of counsel as they may relate to the particular point being discussed.

Now to our first proposition:

I.

This is "mineral land" within the reservation in the grant. Before referring particularly to the language of the statute, we call the attention of the

Court to certain rules which we think are applicable in this discussion. One rule of statutory interpretation which may be considered as settled by the authorities is as follows:

"The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States."

Jennison vs. Kirk, 98 U. S., 453.

Another rule which has been settled by numerous decisions of the Supreme Court of the United States is that "where the statute operates as a grant of public property to an individual, that construction should be adopted which will support the claim of the government rather than that of the individual. Under public grants nothing passes by implication. In the clear and explicit language of the statute must be found all that is conveyed by the grant, and when doubt arises the statute must be construed most strictly against the grantee, the Courts holding that nothing is given, in such cases, except that which is clearly given."

3 *Ld. Dec.* 243;

Chas. River Bridge vs. Warren Bridge, 11 Pet. 420;

D. & P. R. R. vs. Litchfield, 23 How. 66;

Rice vs. R. R. Co., 1 Black 360;

Leavenworth R. R. Co. vs. U. S., 92 U. S. 733;

Slidell vs. Grandjean, 111 U. S. 412;

Barden vs. N. P. R. R. Co., 154 U. S. 288.

Another rule of statutory interpretation which has been more frequently declared by the Supreme Court of the United States than any other is that:

"In case of a doubtful or ambiguous law, the contemporaneous construction of the statute by the executive officers whose duty it is to construe it, or those who have been called upon to carry it into effect, is entitled to great respect, and should ordinarily control the construction of the statute by the Courts."

U. S. vs. Moore, 95 U. S. 760;
U. S. vs. B. M. R. R., 98 U. S. 336;
U. S. vs. Graham, 110 U. S. 219;
Brown vs. U. S., 113 U. S. 568;
Pollock vs. Bridgeport, 114 U. S. 413;
U. S. vs. Philbrick, 120 U. S. 52;
Robertson vs. Downing, 127 U. S. 613;
H. & D. H. Co. vs. Whitney, 132 U. S. 365;
Heath vs. Wallace, 138 U. S. 578;
Pennoyer vs. McConaughy, 140 U. S. 23;
Barden vs. N. P. R. R. Co., 154 U. S. 288.

Mr. Lindley in sections 90 and 91 of his excellent work on "Mines and Mining," after reviewing the various decisions, deduces therefrom the following additional rule of interpretation:

"The word 'mineral' when used in an Act of Congress, must be understood in its widest signification, unless there be something in the context or nature of the case to control its meaning, and when the words 'mines' and 'minerals' are both used in the same statute, the word 'mineral' is not on that account to suffer limitation of its meaning."

Now, in the light of these rules, which we claim are thoroughly established, let us return to the discussion of our first proposition, that lands valuable only for granite or building stone of a good commercial quality are "mineral lands" within the act of Congress.

It is claimed by the complainant that prior to the Act of 1864, Congress had made no provision for the disposal of mineral lands. Even conceding this to be true, it is nevertheless notorious that for years prior to that time mineral lands had been located, mined and disposed of under certain rules and customs pertaining to the district within which the same were located. All of these rights have been repeatedly recognized by Acts of Congress and by decisions of the Supreme Court of the United States, so that under one of the rules of interpretation above laid down, this law exempting mineral lands must be read in the light of matters of public history.

LEGISLATIVE ACTS.

We have heretofore referred to the legislation of Congress up to the Pre-emption Act of 1841. That act excepted from settlement lands on which "are situated any known saline or mines." Counsel contend that the word "mines" as here used, is a limitation of the meaning of the words "mineral lands";

that it confines "mineral lands" to only such substances as gold, silver, copper, cinnabar, lead, etc.

Again, under the act of September 27, 1850 (9 Stat. 496), granting land to settlers in the Territory of Oregon, commonly known as our "Donation Act," the exception is "mineral lands, and lands reserved for salines."

It will be noticed that in place of the word "mines" as used in the Pre-emption Act, the term "mineral lands" is used in this act. But because the term used designating the lands excepted is different in the latter from the former, counsel conclude "the term 'mineral lands' here employed must therefore be assumed to be the equivalent of the term 'mines' under the Pre-emption Act."

Counsel's conclusion is wrong. The terms "mines" and "mineral lands" are not interchangeable as contended, but the truth is that "mineral lands" as used in the Donation Act was understood by Congress to mean lands unfit for agricultural purposes. For Congress, in the act, provides for the survey into townships and sections of all that region lying between the Cascade range and the Pacific ocean, both north and south of the Columbia river. Concerning this work, however, the act contained a significant exception (in Sec. 3) to the effect that none other than township lines shall be run when the land is deemed *unfit for cultivation*. Now Congress, by

subsequent statute, has declared what kind of lands it meant by lands "unfit for cultivation"; for in 16 Stat., p. 217, Sec. 16, Congress enacted that so much of the Donation Act as provided that none other than township lines shall be surveyed "*where the lands are mineral*" is repealed, and the public surveys are extended over all such lands.

Now to repeat—In the Donation Act, Congress provided that where the land is "*unfit for cultivation*" none but township lines need be run, while later it repealed so much of the Donation Act as provided that none but township lines need be run "*where the lands are mineral.*" This we contend is an interpretation by Congress of the language.

Again, the Act of March 3, 1853 (10 Stat. 244), providing for the survey of public lands in California and granting pre-emption rights therein, provided that "none other than township lines shall be surveyed where the lands are mineral." Here, in this act relating to the lands in California, Congress was making the same provisions concerning the running of township lines as it made in the Donation Act, concerning Oregon. It uses the words "mineral lands" and "lands unfit for cultivation" as interchangeable.

The exception from entry of lands under the California act is of "mineral lands."

Counsel, in their brief, claim that the use of the words "mineral lands" in this exception "had no different or other signification than the term 'mines' used in the pre-emption law." Under one of the well known rules heretofore laid down, the interpretation of these laws by the land department of the Government is entitled to great weight. What is the interpretation put upon this law? After the passage of this California act, instructions were issued by the land department to the various land offices. The instructions declared (1 Lester's Ld. Laws, 689, par. 8), that there are excepted from the operation of the act by the term "mineral lands," "all lands on which are situated any known salines or mines." Now, what does this interpretation mean? It means that mineral lands include *salines* which do not belong to the precious metal class of minerals. It also holds that mineral lands *include* "known mines." It does not mean that it *excludes* unknown minerals; for if it excludes unknown minerals, then it also would exclude unknown mines, though such unknown mines might be rich in gold, silver, etc.

The Secretary of the Interior, in his instructions (2 Lester, 304) holds that the word "mines" as used in the Pre-emption Act of 1841, embraces tracts containing coal, "which are to be treated as mineral lands."

Here is a declaration of the policy of the United States to include other than metalliferous substances.

Fortunately we are not without authority as to the meaning of the term "mineral lands." The act for the disposing of coal lands was passed July 1, 1864 (13 Stat. 343), which act has been declared to be a legislative interpretation of the words "mines" and "mineral lands" as theretofore used by Congress.

At this point our views are better expressed in the language of Secretary Bliss as found in the case of *Pacific Coast Marble Company vs. Northern Pacific Railroad Company and the State of Washington*, 25 L. D. 237, which case is exactly in point with the case at bar save the substance in dispute in that case was marble, wherein here it is granite.

The Secretary says:

"It is contended that what Congress meant in this act by the term 'mines' must be gathered from the preceding uniform policy as set forth in the legislation on the subject of mineral in the public lands; and it is claimed that such policy is distinctly indicated by the preceding legislation which reserved to the United States 'lead mines and salt springs, absolutely, and a one-third part of all gold, silver, lead and copper mines' or, excepting salt springs, minerals of the metallic class only. This preceding legislation is referred to as being embodied in a certain ordinance of the Congress sitting under the Articles of Confederation, passed May 20, 1785, and in certain acts of the Congress under the Constitution, passed at various times, down to and including the year 1816.

"It is to be observed, however, that in the act of July 1, 1864 (13 Stat. 343), providing for the disposal of coal lands in the public domain, Congress gave, on this point, its own definition of the term 'mines' as used in the former Pre-emption Act, by declaring that, 'Any tracts embracing coal-beds or coal fields, constituting portions of the public domain, and which, as "mines" are excluded from the Pre-emption Act of eighteen hundred and forty-one,' might be sold under the terms therein prescribed.

"Coal is a non-metallic mineral, and we have here an express declaration of Congress that the same is included within the meaning of the stated exception from said Pre-emption Act.

"In the case of *Mullan vs. United States* (118 U. S., 271) the question was, whether coal lands are mineral lands within the meaning of the statutes regulating the disposition of the public domain. The Court, after referring to the Pre-emption Act of 1841, and the Coal Act of July 1, 1864, said, of the provision herein above quoted from the latter act:

" 'This is clearly a legislative declaration that "known" coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested.'

"Here we have both a legislative declaration, and the highest judicial determination, that the term 'mineral lands' in the public land laws does include minerals other than those of the metallic class."

Now this act for the disposing of coal lands which has been declared, as we have seen, both by the Secretary of the Interior and by the Supreme Court of the United States, to be a legislative declaration that mineral lands include not only metalliferous but fossiliferous substances, was passed a day prior to

the grant to the Northern Pacific railroad. Hence, we have a right to presume that when Congress used the word "mineral" in this granting act on the following day, it used it in the same sense, and with the same interpretation placed thereon by itself the preceding day, and by standard authorities and common law courts prior to the grant. Therefore, let us briefly inquire into the meaning of the word as commonly understood at that date.

Bainbridge on Mines, 4th Ed., p. 1, uses the following language:

"A mineral has been defined, in the narrow sense of the word, to be a fossil or what is dug out of the earth, and which is predominantly metalliferous in character. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountains as the deepest hidden diamonds and metallic ores."

Stewart on Mines, p. 9, uses the following language:

"Both scientifically and popularly the term 'mineral' has been applied to substances whose chemical and physical properties are sufficienly uniform to admit of identification and classification, whether they exist in a mine or upon the surface of the ground."

In Sweet's Dictionary of English Law we find the following definition:

"In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit."

A few illustrations from comparatively recent English and American authorities decided prior to the act of 1864 will enable us better to understand the signification given to the term "mineral" by the English and American Courts at the time of the passage by Congress of the various statutes prior to this grant.

In the case of the *Earl of Rosse vs. Wainman*, 14 M. & W. 859, the highest Courts of England in 1845 passed upon this question. The facts are as follows:

One Jackson was seized in fee of the Manor of Shipley, within which there were several commons or parcels of waste ground. Parliament passed an act reciting that Jackson was lord of the manor, and as such was owner of the soil of the said commons and entitled to all mines and minerals within and under the said common, and reciting further that said Jackson and several other persons were owners and proprietors of estates within the manor, and in respect thereof were entitled to right of common and other rights and interests in and upon the common. It was accordingly (among other things) enacted that the said commons and waste ground should be divided

and allotted among the persons entitled thereto in lieu of and as a full recompense for all right and interest in and to the soil of the commons. It was further enacted that Jackson "should and might, from time to time, and at all times thereafter, have, hold, win, work, and enjoy exclusively all mines and minerals, of what nature or kind whatsoever, within and under said commons and waste ground, * * * with full and free liberty, power, and authority of digging, sinking, searching for, winning and working the said mine and minerals, and leading and carrying away the lead ore, lead, coals, ironstone and fossils, etc."

We call attention to the fact that the act specified ironstone, but does not specify stone.

The Commissioners appointed by the act made their award and allotted and awarded unto the heirs or devisees of Wainman in lieu of his rights in the commons certain enclosures of land. Beneath the lands enclosed, and so awarded or allotted to Wainman, there was in some places the stone common to the district, not the iron-stone mentioned in the act. The defendant agreed to sell this stone to certain stone merchants, who commenced working the land and raised, severed and took away a number of cubic yards of the stone, whereupon the plaintiff being the successor of Jackson, claimed that, as lord of the manor, he was entitled to the stone. The defendant denied the plaintiff had such right, whereupon the

plaintiff caused this action to be brought and the question for the opinion of the Court was whether the plaintiff is entitled to the stone so gotten and raised.

The Court say:

"In our opinion, the right to the stratum of stone was reserved to the lord, and consequently the plaintiff is entitled to recover."

The Court, after then considering the act and its reservation of mines and minerals, etc., used the following language:

"The term 'minerals' here used, though more frequently applied to substances containing metals, in its proper sense, includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that 'all metals are minerals, but all minerals are not metals; and mines, according to Jacob's Law Dictionary, are 'quarries or places where anything is digged.' Beds of stone, which may be dug by winning or quarrying are therefore properly minerals, and so we think they must be held in the clause in question."

Here is a legal definition defining "mines" to embrace "quarries."

Again, in 1851, the Courts of England passed upon the same proposition in the case of *Micklethwait vs. Winter*, in 6 Ex., p. 644.

The facts in this case were as follows:

Micklethwait was seized in fee of the Manor of Ardsley, and of the common and waste land or

grounds within and parcel of the said manor. There was within the manor a considerable tract of common or waste land or ground, the soil or freehold of which was vested in Micklethwait subject to certain rights of common of pasture. The coals and minerals and other substances under the surface of the common belonged to him as part of the soil or freehold so vested in him, and he was entitled to win and work the said coals and minerals.

Parliament passed an Act for dividing and enclosing the open Common. The Act provided that the Lord and all persons claiming under him as lords of the Manor—

"Should at all times thereafter hold and enjoy all rents, services, rights, royalties, etc., belonging to the said lord of the Manor in as full, ample and beneficial manner as they might have held and enjoyed the same in case the Act had not been made."

It will be noticed that this Act did not in terms reserve to the lord any right to the mines or minerals, but simply all such rights, royalties, etc., as he would have possessed had the Act not been passed; it further provided, in the event he should enter for the purpose of taking any of the *coals* or *other minerals* he should pay the owner to whom the lands were allotted, damages. A certain part of the Common was awarded to one Crookes in lieu of certain rights or interests to which he was then entitled. The defendant, who

was the successor of Crookes, opened a quarry in his allotment and dug and raised out of the quarry and converted to his own use large quantities of stone, grind-stone, etc. The plaintiff, as lord of the Manor, claimed the stone as having been found beneath and having been, before the passing of the said Act, part of the said common or waste land. This claim the defendant denied. The question for the opinion of the Court was "whether the plaintiff is entitled to the said stone or not." In the argument the defendant's counsel claimed that the phrase "coal or other minerals" in the Act "means only such materials as resemble coal, or such minerals as are taken from mines, not out of quarries, and that stones are not within the definition of minerals."

Each of the judges delivered a separate opinion in which all concurred that stone was a mineral.

In *Midland Railway Co. vs. Cheekley*, L. R. 4, Exq. 19, the question was whether stone for road making or paving was a mineral. It arose upon a reservation, in the Canal Act, of Mines and Minerals within and under the lands through which the canal was to be made. Lord Rommily, Master of the Rolls, said:

"Stone is, in my opinion, a mineral, and, in fact, everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is mar-

ble, fire-clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land."

In *Midland Railway against Haunchwood, B. & T. Co.*, L. R. 20, Ch. D. 552, the controversy arose under the Acts of Parliament, known as the "Railway Clauses Acts," and the question was whether or not *brick clay* was a mineral. The statute provided that the Company

"Shall not be entitled to any mines of coal, etc., or other minerals under any land purchased by them, except only such as shall be used in the construction of the works; and all such shall be deemed excepted out of the conveyance."

Mr. Justice Kay said that minerals meant, primarily, all substances other than the agricultural surface of the ground "which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are gotten by open working."

In a leading case on this subject in England, *Hext vs. Gill*, L. R. 7, Ch. App. 699, the substance in dispute was *china clay* (Kaolin, sometimes called porcelain, or fire clay). The grant of the freehold, which was executed in 1799, reserved "all mines and minerals within and under the premises, with full and free liberty of ingress, egress to dig, search for, take, etc." The House of Lords in this case announced the rule that a reservation of "minerals" includes

"Every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context, or in the nature of the transaction to induce the Court to give it a more limited meaning."

This decision was subsequently followed and approved in the later case of *Attorney-General vs. Tomline*, L. R. 5, Ch. D. 750.

In the case of *Attorney-General vs. Welsh Granite Co.*, 35 W. R. 617, the question was whether the term "mineral" as used in the enclosure Acts of Parliament passed in 1812 included *granite*. The Master of the Rolls, after reviewing the authorities, said:

"It is evident from these cases that minerals mean substances which can be got from beneath the surface, not by mining only, but also by quarrying, for the purpose of profit."

In the *Magistrates of Glasgow vs. Farie*, L. R. 13 App. Ch. 294, which was a case before the House of Lords, involving the interpretation of a reservation in an Act of Parliament of 1847, authorizing the construction of water works, wherein it was provided that the undertakers of the project shall not be entitled to any mines or minerals under any lands, etc., Lord Herschel announces his views as follows:

"I think the reservation must be taken to extend to all bodies of mineral substance lying together in seams, beds, or strata, as are commonly worked for profit."

In *Bell vs. Wilson*, 2 Drew & S. 395, the question arose as to whether *freestone*, that is, *sandstone*, was within the exception in a lease of "mines and seams of coal, metals, or minerals, as well opened as not opened," and it was held that it was within the exception.

The same substance, viz.: *sandstone*, was held, in the case of *Jamieson vs. North British Railway Co.*, 6 Scot. L. Rep. 188, to be within the "Railway Clauses Acts," which exempted mineral from the grant to the Railway.

The decisions in the English Courts wherein limestone has been held to be a mineral are numerous.

The case of *Tucker vs. Linger*, L. R. 8 App. C. 508, arose in the House of Lords. The question was whether *flintstones* turned up with the plow in the course of husbandry were within the exception or reservation in a lease, of mines, minerals, quarries of stone and gravel pits, and the House of Lords held that it was within the exception. In the cases of *Duchess of Cleveland vs. Myrick*, 16 W. R. 104; *Ruabon Brick & Terra Cotta Co. vs. Great Western Ry. Co.*, L. R. 1 Ch. 427; *Errington vs. Met. Ry. Co.*, L. R. 19, Ch. D. 559; *Attorney-General vs. Mylchreest*, 4 App. C. 294, the question was in each case whether *clay* was a mineral and within the reservation or exception in the "Railway Clauses Acts," excepting mineral, and the Courts decided that it was.

Lindley in his work on Mining and Mines, says in Sec. 90:

"That under the French and Belgium system a mining concession includes whatever mineral substance is susceptible of profitable working."

We now cite the Court to a few of the leading American authorities interpreting the word "mineral:"

Lindley, in Sec. 98, gives the following rules for determining the mineral character of lands:

"While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permits us to deduce the following:

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(a) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(b) Is classified as a mineral product in trade or commerce; or—

(c) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and

marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it."

CONSTRUCTION OF THE LAND DEPARTMENT.

The land department of the United States early announced the doctrine for which we contend. With the exception of two or three cases to be hereafter more particularly referred to and which were subsequently vacated, this has been the settled and uniform policy and construction of the land department. Counsel appear to discover some confusion in the decisions of the land department, but we will show this confusion does not exist.

Let us commence at the beginning of the land decisions of the department and examine them down to date.

In the case of *W. H. Hooper*, I. L. D. 560, the department lay down the following rule:

"Whatever is recognized as mineral by the standard authorities, where the same occurs in quantity and quality to render the land in question more valuable on its account than for agricultural purposes, is mineral within the meaning of the mining laws."

In this case it was decided that borax, carbonate and nitrate of soda, sulphur, alum and asphaltum were minerals and might be acquired under the mineral laws in California. This is contrary to the contention of counsel that under the statute excepting mineral lands in California nothing was excepted save the precious metals.

Among the substances other than those of a metallic character, which have been classified as mineral by the land department of the United States, we note the following:

ALUM: C. M. L. 50; 1 L. D. 561, 572; 2 L. D. 707;

ASPHALTUM: C. M. L. 50; 1 L. D. 561, 572;

BORAX: C. M. L. 50, 100; 1 L. D. 561, 572; 2 L. D. 707; C. M. L. 194; 1 C. L. O. 11;

GUANO: 27 L. D. 95;

DIAMONDS: C. M. L. 88; 1 L. D. 88;

GYPSUM: C. M. L. 309; 1 L. D. 560; *Phifer vs. Heaton*, 27 L. D. 57;

KAOLIN, or Fire Clay: C. M. L. 121, 176, 209; 1 L. D. 565; *Montagu vs. Dobbs*, 9 C. L. O. 165;

MARBLE: C. M. L. 176;

MICA: C. M. L. 182;

CARBONATE and NITRATE OF SODA;

SULPHUR and ALUM: C. M. L. 50; 1 L. D. 561, 572; 2 L. D. 707;

SLATE for roofing purposes: C. M. L. 143; 1 C. L. O. 132;

UMBER: C. M. L. 161;

PETROLEUM and the mineral hydro carbons: C. M. L. 160; 1 C. L. O. 189; 2 C. L. O. 66; 8 C. L. O. 120; 2 L. D. 707; 4 L. D. 60, 284; 16 L. D. 117; 25 L. D. 351;

LIMESTONE, Building Stone, etc.: 2 C. L. O. 66; 8 C. L. O. 120; 9 C. L. O. 5; 10 C. L. O. 50; C. M. L. 176, 309, 509, 510; 12 L. D. 1; 16 L. D. 508; 17 L. D. 82;

PHOSPHATES: *Gary vs. Todd,* 18 L. D. 58;

COAL: *McKeen vs. Buell,* C. M. L. 343; *Townsite of Colville,* 4 C. L. O. 46; *in re Norager,* 16 C. L. O. 54;

SALT Lands are classified as mineral and held to be reserved from railroad grants: *Eagle Salt Works,* C. M. L. 336;

BUILDING STONE and STONE of a special commercial value has frequently been the subject of decision in the land department, and also in the various courts of this country. See cases cited in C. M. L., 2 Ed. pp. 509, 510.

In *Maxwell vs. Brierly,* Secretary Teller held that:

"Land more valuable for its deposits of stone, or whatever is recognized as mineral, than for agriculture, is mineral land."

In the case of *H. P. Bennett, Jr.*, 3 L. D. 116, the question before the General Land Office was, whether or not land covered by high cliffs of granite or rock, and valuable only for its granite, was mineral land, and it was held to be such. This ruling was followed consistently by the land department for a number of years, but counsel cite *Conlin vs. Kelly* in 12 L. D. 1, as a case in conflict, wherein counsel say "It was held that a species of granite, called jasper, valuable for building purposes, is not a mineral under the mining laws."

We submit on close examination that the facts in this case do not justify the counsel's interpretation; the facts are easily distinguishable. Kelly had pre-empted his land and made final payment. *Seven* years afterward, Conlin filed a contest charging fraud and claiming that the land was valuable for mineral and that Kelly had pre-empted it for the purpose of acquiring the stone. It was shown on the trial that the mineral which it was claimed the land contained was unstratified rock, breaking with irregular fractures "fit only for foundations or use in cellars or other places where strong, rough work is required, but possessing little commercial value."

This case approves the decision in *Maxwell vs.*

Brierly, which case, as we have seen, held that limestone used only for fluxing in a nearby furnace was mineral. In the decision the Secretary uses the following language:

"The stone in the tract in controversy has no peculiar property or characteristic that gives it a special value such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, fire clay, kaolin or petroleum."

We think that the language quoted is a holding that stratified granite or rock valuable for building or commercial purposes is a mineral.

Again, the fact that Kelly made final payment seven years before, was quite a factor in the refusal of the Secretary to set aside his filing.

But during the following year in the case of *McGlenn vs. Winebrower*, 15 L. D. 370, wherein the question was whether stone is a mineral, the Assistant Secretary who rendered the opinion in *Conlin vs. Kelly*, distinguished the facts and uses the following language:

"The term 'mineral' is more frequently applied to substances containing metals, but in its proper sense, includes all fossil deposits or matters dug out of mines; in this sense beds of stone may be included in the word 'mineral.' * * * Stone taken from quarries is mineral."

This decision is followed in later cases.

Counsel cite *Hayden vs. Jamison*, 16 L. D. 537, as against our proposition. Let us examine this.

There are three cases of *Hayden vs. Jamison*. The facts were these: Jamison made a homestead entry on the land in September, 1889. In the same month Hayden with others, made a placer location for 120 acres of the land. The first case is in 15 L. D. 276, prior to the one cited by counsel. The evidence showed the "chief value of the land was for red sandstone suitable for building purposes, paving and curbstone." In this first decision the land department held such lands to be mineral lands. Upon a re-trial, in 26 L. D. 373, the department appears to have decided to the contrary; but upon a review of the case before Secretary Bliss March 12, 1898, the Secretary finally disposed of it. He follows the decision in the *Pacific Coast Marble Company vs. N. P. R. R. Co.*, and repeats with approval the definition of mines and minerals from Bainbridge heretofore quoted in our brief, and stated as follows:

"Unquestionably the great weight of authority is to the effect that sandstone is a mineral substance."

Accordingly he cancelled the homestead entry of Jamison, *vacated* the decision cited by counsel from 16 L. D., and permitted the placer entry of Hayden, although this placer entry was made three years prior to the act of 1892.

Clark vs. Erwin, 16 L. D. 122, is cited by counsel. In that case the land contained valuable building stone, but much of the land was also suitable for agricultural purposes, and the Secretary, while recognizing building stone as a mineral, held that under the circumstances and facts of the case, the same might be taken under agricultural lands. He does not deny the proposition that lands chiefly or only valuable for stone are not enterable under the mining laws.

The case of *South Dakota vs. Vermont Stone Company,* 16 L. D. 263, occurring a few days later, is a case in which the facts are similar to the facts, and the stone is of the same character as the stone in *Conlin vs. Kelly,* and it is expressly based upon the authority of *Conlin vs. Kelly.*

Counsel also cite the case of *Elias Jacobs,* 7 Copp's Land Owner, 83, as authority for their contention that limestone was not excepted from the grant to the Southern Pacific Railroad Company. This case was repudiated by numerous later decisions of the department cited *ante* under the substance "Limestone" in our specification of substances and later, as learned counsel concede, it was overruled in *Marble Company vs. N. P. R. R. Co.,* hereafter more particularly examined. This is certainly a repudiation by the department of the doctrine for which counsel contend.

But to set matters at rest and remove any doubts, Congress passed the act of 1892, permitting stone to be taken under the placer mining laws. This was an interpretation by Congress, we think, and a Congressional approval of the previous long continued holdings of the land department. The Secretary of the Interior in his instructions to the registers and receivers concerning this act, says (15 L. D., 360):

"It is not the understanding of this office that the first section of said act withdraws land chiefly valuable for building stone from entry under any existing law applicable thereto."

In view of this instruction and construction of the Secretary of the Interior, the counsel's contention that, prior to this act, stone lands were not purchaseable under the mineral laws, falls to the ground.

Concerning the passage of this Act of 1892, Lindley, in Sec. 421, uses the following language:

"The passage of the act of Congress referred to, occurring as it did subsequent to Assistant Secretary Chandler's first ruling, was a legislative affirmance of the theory of interpretation applied to other classes of non-metallic substances, and a recognition of the rule which has for its foundation the element of commercial value. More than once Congress has intervened when the department has undertaken to disregard this element, by applying arbitrary rules to individual cases."

Less than six months after the decision in the case of *Clark vs. Irwin*, and *South Dakota vs. Ver-*

mont Stone Co., the question again arose in the case of *Van Doren vs. Plested*, 16 L. D., 508. In this case the Secretary criticises the case of *Conlin vs. Kelly*, and held that lands containing deposits of sandstone, valuable only as a stone quarry, are mineral lands. He uses the following language:

"Under the law as it existed prior to the Act of 1892, lands containing deposits of sandstone of quality for building and ornamental purposes, and valuable only as stone quarries, might be entered as placer claims under the general mining laws."

And in the later case of *Paris vs. Gibson*, 21 L. D. 329, Secretary Hoke Smith refused to follow the case of *South Dakota vs. Vermont Stone Company*, saying:

"Contemporaneously with the passage of the Act of July 9, 1870, the Land Office held that lands chiefly valuable for building stone were mineral lands, and subject to location as placers."

Counsel also cite *Jordan vs. Mining Co.*, 20 L. D. 500, as authority that aluminum is not a mineral. This case is not in point. The formation was brick clay, and the Secretary found that alumina "does not exist in paying quantities," and in any event the "deposit was not such as would impress a mineral character upon the land."

As the latest and best reasoned case wherein this same question in this same grant, and against the

same Railroad Company is involved, we cite from the very able opinion of Secretary Bliss in *Pacific Coast Marble Co. vs. Northern Pacific Railroad Company*, 25 L. D. 244. In this case the learned Secretary says:

"Ever since the enactment of the mining laws, however, as has been shown, the construction by the Land Department, with practical uniformity, has been the other way. The more liberal view was early adopted and has since prevailed to the extent that many titles to lands patented as mineral, though of the non-metallic class, are now depending upon it. This view having been generally accepted for so long a time, and property rights having grown up under it, there should be, in my judgment, the clearest evidence of error, as well as very strong reasons of policy and justice controlling, before there should be a departure from it. * * * It may be well to note in this connection, that soon after the decision in the case of *Conlin vs. Kelly, supra*, wherein lands containing stone, useful only for building purposes, were held not subject to the operation of the mining laws, Congress, by Act of August 4, 1892 (27 Stat., 348), especially declared that lands 'chiefly valuable for building stone,' should be enterable 'under the provisions of the law in relation to placer mineral claims.' It would thus seem that Congress regarded even the ruling in that case as a departure from the liberal construction theretofore adopted by the Land Department, to such an extent as to demand legislative action disapproving the result thereof.

"Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late day. Independently of these things, however, it may be added that the construction, as an original proposition, ap-

pears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:

"That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.' "

It will thus be seen that the Land Department of the Government has universally held stone to be a mineral.

Further as touching the policy of the Government see "Report of the Public Lands Commission" made pursuant to Act of March 3, 1879. The public lands were classified into five classes:

(1) Arable lands;
(2) Mineral lands;
(3) Irrigable lands;
(4) Pasture lands;
(5) Timber lands.

Now, under which head was stone included? Stone lands were known to exist. Fortunately, the Commission enlighten us, for on page 21, they say:

"The Commission has endeavored to carefully define the five classes of land above enumerated so that each distinction should be properly *inclusive and exclusive.*" (Italics our own.)

Now, if these classes are to be *inclusive and exclusive*, then the mineral lands must include stone lands and all other lands chiefly valuable for mineral, and *exclude* every other character of land; the other classes being *inclusive and exclusive, exclude* all lands chiefly valuable for mineral.

Counsel's argument that stone was not considered a mineral, because no law was provided under which the same could be obtained, is without force. The mere fact that no law existed under which stone lands could be patented does not signify it is not mineral land. Prior to 1866, no law existed for the disposal of gold and silver claims, and Congress never authorized the disposal of a foot of such lands; yet they were mineral nevertheless, and were taken, worked, sold, traded, and formed subjects of barter and exchange between citizens for 18 years prior to any law authorizing such. Admitting, for the sake of argument, that stone claims could not be taken under the mining laws this fact does not make them non-mineral. Congress reserved mineral lands, though for years after such reservation, it may not have provided for the disposal of them. The mere reservation of lands, with no provision for disposal, does not make the reserved lands non-mineral.

McFadden vs. M. V. M. & M. Co., 97 Fed. Rep. 679.

Let us now examine the contention of the counsel that while stone may be mineral within the mean-

ing of Congress, yet stone lands are not "mineral lands" within the exception in its grant to Railroads, and to States, a distinction, in our opinion, more fanciful than real. Here again, we can better express our views by quoting from Secretary Bliss in the case of *Pacific Coast Marble Company vs. Northern Pacific Railroad Company, supra.*

"At the very threshold of the discussion of this branch of the case, we are met by the aforesaid act of July 1, 1864, passed the day before the grant to the railroad company was made, wherein it was declared that coal—a non-metallic mineral—is within the exception of mineral lands in the pre-emption act of 1841, and with the case of *Mullan vs. United States, supra,* holding that this was a legislative declaration to the effect that coal lands are mineral lands within the meaning of that term as used in statutes regulating the public lands unless a contrary intention is clearly manifest. This legislative interpretation of the word 'mines,' used in the pre-emption act, as including non-metallic minerals, given the day before the grant to the railroad company was made, is very significant, and would seem to negative all idea that Congress intended by the use, the next day, of the term 'mineral lands,' in said grant, to include thereby only lands containing the metalliferous minerals. The larger and more comprehensive meaning would seem clearly to have been intended, in the absence of anything plainly manifesting a contrary purpose.

Again, the proviso in the excepting clause of the Company's grant, that the word 'mineral,' when used in the act shall not be held to include *coal* and iron, clearly shows the mind of Congress on the subject. If the purpose had been to except from the grant only lands valuable for metalliferous minerals, there would have been no necessity for said proviso as to coal; and

if the exception of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception co-extensive with the grant, is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean: chiefly valuable for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes. There is nothing in the act making the grant to this company, nor in any contemporary legislation on the subject of which the Department is aware, that clearly manifests an intention on the part of Congress to restrict or limit the meaning of the term 'mineral lands,' as used in said grant to metalliferous minerals only. The same may be said of the grant to the State."

In *A. & P. Railway Company*, 12 L. D. 116, the Secretary of the Interior appears to construe the grant to the Railroad Company as passing only land suitable for agricultural purposes, and as excluding from the grant land valuable chiefly for commercial mineral substances, and directs that there be carried in the patent a clause expressly excluding therefrom "all mineral land other than coal or iron lands."

Again the Secretary of the Interior in his instructions to the various land officers, in July, 1894, 19 L. D. 21, relating to selection by Railroad Companies of lieu lands requires the Companies to show by affidavit the mineral or agricultural character of the lands.

Counsel also cite the case of *Tucker vs. Florida Railway & Navigation Company*, 19 L. D. 414, which holds that the exception of mineral lands to the Railroad Company did not include phosphate deposits. The facts of this case are not parallel, as one of the acts under which the lands were selected, contained no exception whatever, and besides it is squarely in conflict with the decision of the same Secretary in *Gary vs. Todd*, 18 L. D. 58. But it is useless to spend further time in distinguishing the case, for the same is re-examined and as learned counsel concede, is squarely over-ruled by a later decision of the Interior Department in the *Pacific Coast Marble Co. vs. Northern Pacific Railroad Company*, 25 L. D. 247. It is again reviewed in 26 L. D. 600 and *vacated*.

Another case cited by the counsel is *Union Oil Co.*, 23 L. D. 222, wherein Secretary Smith, the same who rendered opinion in the Tucker case, held that petroleum land in California, was not within the exception of mineral lands in the grant to the Southern Pacific Railway Company. This decision is contrary to the uniform holding as evinced in frequent prior decisions of the department, and it was likewise reviewed and *vacated* in 25 L. D. 351.

In *Aldritt vs. Northern Pacific R. R. Co.*, 25 L. D. 349, it was held by the Secretary of the Interior that "land chiefly valuable for its deposit of fire clay is included in the exception of mineral lands from

the grant to the Northern Pacific Railroad Company."

In *Florida Central & Peninsula Railroad Company*, 26 L. D. 600, Secretary Bliss holds that the act granting lands to the railroad company "does not in express terms include mineral lands, nor are such lands expressly excluded therefrom, but in view of the uniform and settled policy of the government to reserve such lands from grants to states or corporations for any purpose, it is held that all such lands, whether valuable for phosphate or other mineral deposits, are excepted from the operation of said grant."

It was again held, in 27 L. D. 91, that under Section 2325 R. S. an application for a mineral patent may embrace "any land claimed and located for valuable deposits," etc.

In the case of *Richter vs. State of Utah*, 27 L. D. 95, it is held that guano is a mineral and lands valuable for deposits of guano are mineral lands within the meaning of the laws of the United States, and excepted from grants to states.

The case of *Swank vs. California*, 27 L. D. 411, involved the right of California to select certain lands as indemnity school lands under its grant by the act of March 3, 1853, and it was held that prior to the approval of a school indemnity selection, land in-

cluded therein, if mineral in character, is open to exploration and purchase under the mining laws.

In 28 L. D., 348, it was held that "under the public land laws of the United States, lands valuable for mineral deposits can be disposed of only under the mining laws."

In 29 L. D., 181, Secretary Hitchcock held lands chiefly valuable for the gypsum and petroleum contained therein are not subject to school land indemnity selection.

In *Tulare Oil Co. vs. S. P. R. R. Co.*, 29 L. D. 269, Secretary Hitchcock held that lands chiefly valuable for their deposits of asphaltum are not subject to selection as indemnity under the railroad grant from which mineral lands are specifically excepted.

In *Schrimpf et al. vs. N. P. Ry. Co.*, 29 L. D. 327, the Secretary of the Interior held that "marble and slate are mineral substances and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws, and within the meaning of the excepting clause in the grant to the Northern Pacific Railroad Company."

In 29 L. D., 456, gilsonite, asphaltum, elaterite, albertite, and like substances are held to be minerals.

But we think Congress itself has expressly declared its interpretation of the term "mineral lands" as used in the Act to be in accordance with the foregoing contentions. We refer to "An act to provide for the exemption and classification of certain mineral lands in the States of Montana and Idaho," approved February 26, 1895. As will be seen by the title the act relates to mineral lands.

Sec. 1 provides that all lands shall be examined and classified with *special reference* to the *mineral* and *non-mineral* character of such lands, and that the land officers shall reject, cancel and disallow any and all claims or filings "heretofore made or which hereafter may be made by the Northern Pacific Railway Company, which may be classified as *mineral lands.*"

Sec. 3 provides that:

"All lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase (mark the words 'open to exploration,' etc.) under the mining laws; and that the Commissioners in making classification shall take into consideration the mineral discovered or developed on or adjacent to such land, and the *geological formation* of all lands to be examined and classified, or the land adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, etc. *Provided,* that the word 'mineral' shall not be held to include iron or coal." (Italics in above quotation our own.)

April 13, 1895, the Secretary of the Interior issued his instructions to the Commissioners wherein in instructing them how to arrive at the character of lands, he quotes the above language from Sec. 3 (20 L. D. 350).

This act has been construed by the Land Department in the case of *Beaudette vs. N. P. R. R. Co.*, 29 L. D. 248. In that case the Commissioners, under the Act of 1895 classed certain lands as non-mineral; Beaudette filed a protest against the acceptance of the classification, alleging that the land "contains a valuable deposit of sandstone suitable for building purposes, and that it is unfit for agricultural purposes." Upon hearing wherein the Northern Pacific Railroad Company was represented by its attorney, and defended the classification, the non-mineral classification was set aside, and upon appeal by the Railroad Company to the Secretary of the Interior, that officer used the following language:

"It appearing that the land in controversy is of vastly more value on account of the sandstone it contains, than for agricultural purposes, it results that the classification thereof made by the Commissioners is wrong, and that the land, although part of an odd numbered section within the primary limits of the grant to the Northern Pacific Railroad Company, did not pass under such grant and that said classification cannot be upheld, nor the contention of said company that it is not mineral land within the meaning of the excepting clause of said grant, be sustained."

Morrill vs. N. P. R. R. Co., 30 L. D. 475, is another decision by Secretary Hitchcock under this classification Act of 1895. The lands were classified as non-mineral in character by the Board of Commissioners. Morrill filed a protest alleging the existence of "A large deposit of limestone thereon valuable for fluxing purposes and also for building purposes." The learned Secretary states the question involved to be:

> "Whether the lands in controversy are shown to contain valuable mineral deposits such as render them open to exploration, occupation and purchase under the provisions of the United States mining laws."

After an extensive examination of the whole subject and a review of a number of former decisions of the department, the Secretary held that such lands were "valuable mineral deposits," and "open to exploration and purchase" under Section 2319 R. S., and consequently were within the exception in the grant to the railroad company excluding mineral land.

Our views as to this Congressional interpretation are expressed, much more clearly than we can express them, in the opinion of the learned District Judge Hanford, who tried this cause, which is set forth in the records, pages 33 to 36, and to which we respectfully refer.

Counsel further call attention to the fact that Section 2 of the granting act gives to the company the

right to take stone from adjacent lands. Why, we ask, did Congress give this right specially if it was not in the exception? Why would Congress do such a needless, idle thing?

Counsel further call attention to the Sundry Civil Expense Bill of July, 1898, 30 Stat. 597-620, and claim such is an interpretation of Congress that stone is not within the mineral exception in the grant. This statute provides that where, prior to January 1, 1898, any portion of the odd numbered sections is claimed in good faith by any settler who refuses to transfer his entry to some other lands, the company, upon a proper relinquishment thereof, shall be entitled to select in lieu of said land relinquished, an equal quantity of public lands "not mineral or reserved, and not valuable for stone, iron or coal." Counsel relies upon a proviso wherein it is declared that the company shall not be bound to relinquish lands which it uses and needs for railroad purposes, or lands valuable for stone, iron or coal. Counsel will not claim that they are bound to relinquish the lands in any event, no matter what their character, for certainly if the lands became the property of the company in March, 1884, the mere fact that some settler during the succeeding fourteen years settled thereon would not give Congress the right arbitrarily to declare that the company shall, by reason of this fact, relinquish its lands and choose other lands. This would certainly be taking property without due process of law. The act

simply gives the company the right to select lieu lands in case they do relinquish. The history of the decisions in the land department between the railroad and settlers shows that a great deal of trouble and of controversy have arisen between the settlers on the one hand and the company on the other, principally over the indemnity selections by the company. It appears to have been with this understanding that the provisions in question were inserted by Congress in the Sundry Civil appropriation bill. The land department and the Secretary of the Interior have construed this act, and in the regulations under the act to facilitate the adjustment by the Land Department of such conflicting claims shown in 28 L. D., 103, the Commissioner says the act designates a class of beneficiaries whose status is that of claimants adverse to that of the railroad company. It applies entirely to contests between settlers and the company and only to claims arising upon settlement, entry or purchase remaining unpatented at the date of the passage of the act, and not to claims arising upon rejected application or any other kind of a claim. (See 28 L. D., 124-126; 29 L. D., 224, 242); and the act is subsequently referred to by Congress in Act of March 2, 1901, as a "plan for the adjustment by the land department of conflicting claims, etc." Now, conflicting claims to lands excepted from the grant to the Northern Pacific Railroad Company have been held by the Land Department not to be subject to adjust-

ment under the provisions of this act. (See 30 L. D., 602.) It can in no sense be interpreted as an expression by Congress of the intention that stone lands passed to the railroad under its original grant. It must be assumed that the Land Department understood the purpose of the act; and in the regulations heretofore referred to the Secretary says:

"The purpose of the act is to avoid further strife and contention before the Land Department between the railroad company and individual claimants, and to that end extends alternatively to the individual and the railroad an opportunity to acquire lands of equal area in lieu of those in contest. The privilege of making the lieu selection is not dependent upon success or failure in the contest, but rather upon the existence of a contest or controversy which is intended to be disposed of without subjecting the parties to the delay, expense and inconvenience incident to its further prosecution. * * * A claim which will support a relinquishment and lieu selection is not described as a *lawful* one, but as a right— * * *claim.*" etc.

Now, as further evidence of the understanding of the Land Department that it was not a recognition of the right of the company to hold the stone lands, the Secretary in these instructions further informs the various local officers that where it satisfactorily appears from the record in any contest that the lands in controversy are valuable for stone, coal or iron, and consequently such as the railroad company is not bound to relinquish, he shall notify the individual who has the option of such fact, and unless the individual

himself elects to relinquish the same and take other lands "the contest will proceed to final determination without further regard to said act."

Now, why will the contest proceed if the railroad company is to have the lands upon a showing that they are stone lands? It is the purpose that if neither party will relinquish they shall fight it out and settle it by the law; but this same question has been raised before the Interior Department, in the case of *Schrimpf et al. vs. N. P. R. R. Co.*, 29 L. D., 327, involving lands in the State of Washington, shown to be more valuable on account of the marble and slate they contained than for agricultural purposes; and the question came up on the protest of Schrimpf against the patenting of the same to the Northern Pacific Railroad Company, because of the alleged mineral character. In this case the railroad claimed that they were not exempt from the claim of the Company, because Congress by this Act of July 1, 1898, definitely "recognized them as being within said grant." The Secretary, after a hearing on the question, says:

"It does not appear how this act can affect the question presented in this case, nor why it is cited, unless to show that Congress was of opinion that 'stone' lands are not embraced in the term of 'mineral lands.' The conclusion that such views were entertained by Congress does not necessarily follow from the language used in said act, nor does it follow that the word 'stone' would necessarily include marble or slate; but however this may be, the department is of

opinion that lands more valuable for their deposits of marble or slate than for agricultural purposes were by the granting act of 1864 excepted from the grant as mineral lands."

Having thus reviewed the question in such light as can be gained from an examination of the history of the Acts of Congress prior to the first mining law, and of the holdings of the Land Department, we will now examine some of the leading authorities of the various courts of the country upon the same subject.

Barringer & Adams in their recent work on the "Law of Mines and Mining in the United States," page 131, lay down the rule that though a particular mineral may not be mentioned or known to exist at the time of the grant, yet if it is fairly included in the general terms used, it will be excluded.

In *Gibson vs. Tyson*, 5 Watts, 35, the question was whether *chromate of iron* was included in the reservation of the grant reserving "all minerals," and it was held that it was.

In *Hartwell vs. Cammon*, 10 N. J. Eq. 128, the question arose upon the construction of the term of a conveyance granting "all mines, minerals, opened or to be opened." An article known as *paintstone* was claimed on the alleged ground that it was valuable for its mineral properties, and that it could be converted into a merchantable article adapted to the mechanical and ornamental arts, and was a mineral within

the definition given to that term by men of science. The Supreme Court of New Jersey say:

"I do not think the term should be confined to the metals, or metallic ores. I cannot doubt if a stratum of salt, or even a bed of coal, had been found, they would have passed under the grant."

In *Funk vs. Haldeman*, 53 Pa. St. 229, the Supreme court of Pennsylvania held that petroleum oil was a mineral.

Under a statute of Pennsylvania passed April 25th, 1850, it was provided that a suit might be brought by a tenant in common of "minerals." *Thompson vs. Noble* was a suit of this character brought by a tenant in common against his co-tenant to recover certain petroleum.

The Court of Common Pleas held:

"The petroleum was a mineral, *and the fact that it was unknown as a product from land at the time* the act was passed did not prevent its application." (Italics our own.)

Another statute authorized the mortgaging of a leasehold of mining land. Subsequent to the passage of the act, certain lands were discovered to contain oil, and they were mortgaged as mining land. The question, therefore, arose in *Gill vs. Weston*, 110 Pa. St. 316, whether or not these oil lands were mining lands, and if so, whether or not, being unknown to be

such at the passing of the act, they were included. The Court held that:

"Petroleum was a mineral substance obtained from the earth by process of mining, and lands from which it is obtained may, with propriety, be called mining lands, and that the Act applied to and authorized a mortgage of the leasehold of oil lands, although the Act was passed *before petroleum was discovered.*"

Judge Ross of the U. S. Circuit Court, in *Gird vs. Cal. Oil Co.,* 60 Fed. 531, decided as follows:

"The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws."

An instrument of lease executed in 1796 leased a tract of public lands "together with the mines or minerals of whatever description." There were no opened mines or quarries on the premises or known to exist thereon at the date of the lease. A stone quarry was discovered in 1855 (61 years later), and the question whether or not stone was included in the word "minerals" as used in the lease, came before the Supreme Court in *Griffin vs. Fellows,* 8 Mor. Min. Rep. 657, which held that:

"The term 'minerals' embraces everything not of the mere surface, which is used for agricultural purposes; that the granite of the mountains, as well as metallic ores and fossils, are comprehended within it."

In a late case of *W. & C. Nat. Gas Co. vs. Dewitt,* 130 Pa. 235, the Supreme Court of Pennsylvania held

that "natural gas is included within the meaning of the word 'mineral.'" The same holding was made in *State vs. I. & B. O. O. G. & N. Co.*, 2 Inter. St. Com. Rep. 758; and the Circuit Court of the United States for the Northern District of New York In Re *Buffalo Nat. Gas & Fuel Co.*, 73 Fed. 191, decided that natural gas when brought into this country from Canada through pipes, was exempt from duty as "crude mineral."

In *Armstrong vs. Lake Champlain Granite Co.*, 32 N. E. 186 (147 N. Y. 95), the grantor had conveyed to the grantee all the "mineral and ores in the tract of land." Plaintiff was the owner of whatever passed by the conveyance of "minerals and ores." The defendant was owner of what remained of the tract. Subsequent to the conveyance of the "minerals and ores," granite was discovered on the premises, and the defendant began to quarry it; plaintiff claiming that it was included in his purchase of the "minerals and ores," brought an action. The Supreme Court of New York held:

"That the words 'minerals and ores' standing alone would include granite; that it was an unwarrantable limitation to exclude from the operation of the grant beds of coal or other non-metallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time."

And see further as to what are mineral lands.

Lindley on Mines and Mining, Secs. 94 and 95;

Ah Yew vs. Choate, 24 Cal. 562;

Davis vs. Wiebole, 139 U. S. 507.

Freezer vs. Sweeney, 21 Pac. 20, was an action brought to determine the right of possession to a mining claim. The defendant claimed under a location of 1886 as a "placer mining or stone quarry claim." Plaintiff claimed under a location made a year later as a "placer claim." The Supreme Court of Montana held:

"That Sec. 2329 of the Revised Statutes (which is part of the act of 1872) enlarges the signification commonly given to 'placer claims' and makes such locations include all forms of deposit excepting quartz claims or rock in place."

"It is not presumable that the government of the United States intended to deprive its citizens of the use of, or means of acquiring title to, something so necessary and indispensable as rock or stone is for building purposes; and, if the land in which rock or stone-quarries are found cannot be taken up under the provisions of the section mentioned, no provision of the land laws is known under which title to such deposits can be acquired, when they are found outside of lands valuable for minerals (strictly speaking), or outside of agricultural lands, title to which can be acquired under the pre-emption and homestead laws."

On this same subject we cite the opinion of the Circuit Court and Circuit Court of Appeals contained in the transcript herein.

In *Johnson vs. Harrington,* 5 Wash. 78, the Supreme Court of Washington uses the following language:

"That stone is a mineral will hardly be disputed. See Copp's Mining Laws (2d Ed.), page 510. It has been recognized as such by the duly authorized department of the government, and entries of land containing valuable deposits of building stone or limestone are permitted as 'placer claims,' under Sec. 2319 and 2329 of the Revised Statutes of the United States, which relate to the entry and patent of mining claims."

In *Ford vs. Gracey,* 94 U. S. 762, Justice Miller recognizes the existence of "ore or other mineral product" in mines.

We are not unmindful that the Supreme Court of Washington, in *Wheeler vs. Smith,* 5 Wash. 704, seemed to forget its previous ruling and held that the term "mineral" was intended to embrace only deposits of *ore,* and excluded the idea of non-mineralized deposit. This decision stands alone in American jurisprudence. Mr. Lindley severely criticises it in his work in Sec. 96, as follows:

"The Supreme Court of the State of Washington in the case of *Wheeler vs. Smith* seeks to limit the meaning of the term "mineral," as used in the Con-

gressional Mining Laws to *metallic substances.* In doing so the Court treats the ruling of the Land Department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the Supreme Court of Montana (*Freezer vs. Sweeney*), a Court noted for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the Supreme Court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term mineral."

And again in Sec. 323, on page 425, he gave our Supreme Court a parting shot by again referring to it as "an offending state Court which announced the doctrine that a mineral deposit could not be patented under the mineral law unless it contained some of the *metals.*"

Hoke Smith severely criticises the same Court for invading his jurisdiction in the same case. Secretary Bliss in *Pac. Marble Co. vs. N. P.* (*supra*) also criticises it. A careful examination of the case justifies us in making the following criticisms:

(1) It is contrary to authority and is not binding.

(2) The decision of the question was unnecessary.

In *Cohens vs. The State,* 6 Wheat. 264, C. J. Marshall said:

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in

connection with the case in which they are used, and do not control the judgment in a subsequent case involving the precise point, etc."

Again, *Carroll vs. Carroll*, 16 How. 275, holds that Courts are not bound by any part of an opinion in any case not needful to the ascertainment of the right of a question between the parties.

In *Broder vs. N. W. & M. Co.*, 101 U. S. 274, it was held grants to the Pacific railroads were not intended to curtail the right of miners to make locations.

Lindley, in Sec. 152, uses the following language:

"When these railroad acts became laws, the policy of the government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the states for school purposes."

From the formation of the government until the first mining law of 1866, the settled policy of the United States was not to part with the ownership of the mineral lands. From every grant they were reserved, so that the courts take the view that from this policy an intention to do so was implied in all cases.

Barringer & Adams, *supra*, 194;
Morton vs. Nebraska, 21 Wall. 660.

This court has heretofore reviewed the very statutes cited by the counsel in this case and has laid down the rule that these statutes evidence the policy of Congress to exempt all mineral substances from railroad grants.

Barden vs. N. P. R. R. Co., 154 U. S., pp. 317, 318.

Concerning the citations of the counsel from the courts, we have heretofore said that those from California, Nevada and United States were not applicable. Counsel quotes from Justice Miller in his instruction in *Stevens vs. Williams*, 1 McCrary. In this instruction that learned jurist recognized the distinction between *ore*, strictly speaking, and mineral. All ore is mineral, though all mineral may not be ore.

The citation from 101 Pa. St. does not strengthen counsel's contention, for it holds that petroleum is a mineral, and contrary to learned counsel's contention in the case at bar, it distinctly holds also that "anything dug from mines or quarries" is mineral.

In view of the above we apprehend that it will be conceded by complainant that there was reserved from the grant the rights of miners to make exploration and discovery for mineral, but they narrow the construction to be put on minerals by limiting the word "mineral" to some of the precious metals, and this brings us to the discussion of our second proposition, viz:

II.

That independent of the question whether stone was understood to be a mineral at the time of the passage of the act, Congress has so extended the mining law as to make minerals include stone, and has otherwise reserved and appropriated stone lands, and consequently at the date when the railroad became entitled to select these lands, they were otherwise reserved or appropriated, and were not free from other claims or rights, but were mineral lands within the meaning of the laws at that date, and subject to other claims or rights.

There can be no doubt of the power of Congress to do this, and especially when the grant was made subject to the reserved power of Congress to add to, alter, or amend the Act.

Menotti vs. Dillon, 167 U. S. 703;
N. P. R. R. Co. vs. Sanders, 166 U. S. 620;
Lindley on Mines and Mining, Sec. 158.

The Land Department have been adhering to this same doctrine. In 20 L. D. 332 it was held by that Department that the withdrawal on the general route for the benefit of the Northern Pacific grant was no bar to the subsequent establishment of an intended reservation within the limits of such withdrawal. This is affirmed in 26 L. D., 422.

Secretary Bliss, in the case of the N. P. R. R. Co., 27 L. D., 505, further held that a reservation for any

purpose, within the limits of the withdrawal, made prior to the definite location of the line of the railroad and existing at such time, excepts the land covered thereby from the operation of the grant.

See, also, *N. P. R. R. Co. v. Martin*, 6 L. D. 657.

In *Ivanhoe Mining Co. vs. Keystone Mining Co.*, 102 U. S. 167, this Court furnishes a most interesting review of the policy of the United States to preserve all mineral lands from sale and for its own use, and of the reasons which finally resulted in the government abandoning such policy and enacting the mining laws. This decision shows that it was the policy of the government from the beginning to secure to itself a fair proportion of the minerals and the control of the same. That while Congress delayed and hesitated to act in framing a policy for its own use, the discovery of gold in California, with the consequent swarm of enterprising and industrious citizens filling that country and dealing in claims almost as current as currency, forced the matter upon the attention of Congress. And still so anxious was Congress to persevere in the policy of reserving all mineral lands that it held the matter in abeyance until 1866.

"During the period from 1849 to 1866 the system of the disposition of the public lands, in general, had to be introduced into California, and grants of land were made to the State for various purposes, also to railroad companies; and in all this the attention of Congress was, necessarily, turned to the distinction

between mineral lands and the ordinary agricultural lands of the other western states to which similar laws applied. * * * And so careful was Congress to protect mineral land from sale and from pre-emption that, * * * the surveyors were forbidden to extend their surveys over mineral lands."

This appears to us to be a ruling in favor of the position that these Congressional grants were only of agricultural lands, strictly speaking; and further, if Congress was so careful to protect mineral land from sale as to forbid the surveyors to survey the mineral lands, how can counsel by any reasonable construction infer that land containing mineral substances so useful and valuable as stone, the lines of which could not be surveyed, was nevertheless not mineral lands.

See, further, Barringer & Adams, *supra*, p. 196.

But Congress finally enacted the first mining law of July 26, 1866 (14 Stat. 251). Section 1 of this first mining law, passed July 1, 1866 (14 Stat. 251) declares:

"That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States."

Our contention is further strengthened by the tracing of the evolution in this respect running through the several acts for the disposal of mineral lands.

As we said before, under the appropriation made yearly by Congress exploration and discovery had been going on, and this first mining law, which consisted of eleven sections, was, four years later (16 St., p. 217), amended by the addition of six sections numbered from 12 to 17 inclusive, which sections it was declared "shall hereafter constitute and form a part of the aforesaid act." The first section of the amendment enacts "that claims, usually called 'placers,' including *all forms of deposit*, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions as are provided for veins or lode claims."

This act, together with the act of May 10, 1872, hereafter referred to, so far as they are unrepealed, have been consolidated and now constitute Chap. 6, Title XXXII. of the Revised Statutes, and with the acts supplementary thereto, now cover exclusively the granting of mineral lands by the United States.

Gelcich vs. Moriarity, 53 Cal. 217;
Barringer & Adams, supra, page 196.

In all cases lands valuable for minerals or containing valuable mineral deposits shall be reserved from the sale except as otherwise expressly directed by law. (R. S. 2318, 2319). Hence, assuming for the sake of argument, that it was the intention of Congress that lands valuable for stone were not included in the exception of mineral lands in the grant to the

Northern Pacific Railroad Company this court has held, as we have heretofore seen, that it was nevertheless competent for Congress at any time thereafter, prior to the definite location of the road, to make such reservations or to reserve from said grant such lands as Congress might choose; and therefore, if Congress saw fit to reserve from time to time, as it has done, agricultural lands for purposes of reservation, it certainly could reserve lands valuable for stone; and if this reservation was made prior to the definite location of the road, such lands were not, at the date of such definite location, unreserved or unappropriated or free from other claims, because they were by reason of such reservation open and subject to exploration, occupation and purchase. Such lands now can only be taken under the mineral laws, with the exception of mineral lands in the states of Michigan, Wisconsin and Minnesota (R. S. 2345), Kansas and Missouri (19 Stat. 52), Alabama (22 Stat. 487), in which states mineral lands can be taken as agricultural lands.

Now the complainant concedes that this granite is not a vein or lode claim, nor is it rock in place, and also concedes that it is a "form of deposit;" but contends that it is not such a "form of deposit" as is included in the word "placers." The act, bear in mind, is to broaden the meaning of placers as theretofore understood. It says that claims usually called placers, and which theretofore might have been interpreted to mean only claims having gold dust in the sand,

shall include all *forms of deposit*, excepting veins of quartz, or other rock in place, so that it makes no difference whether the form of deposit contains any of the precious metals or not. If it is a deposit of any substance belonging to the mineral kingdom, and more valuable for that particular substance than for agriculture then it is mineral land, and if it is not a vein of quartz or other rock in place, then it is a placer.

Speaking on this subject, Mr. Lindley in Sec. 419, says:

"We say that all forms of deposit, other than those occurring in veins of rock in place, must be appropriated under the laws applicable to *placers*, for the reason that *placers* present, in popular estimation, the highest type of deposits which do not occur in veins of rock in place, and are the only class of such deposits as are individualized and specially named in the statute."

After thus laying down the rule Lindley takes up the theory so often advanced that claims usually called "placers" were granted for the first time by the mining act of July 9th, 1870, concerning which he says as follows:

"This has always been familiarly called the 'placer law' in contradistinction to the 'lode law' of July 26th, 1866. The subsequent legislation preserved the distinction, so that, colloquially speaking, mineral deposits are to be treated either as lodes or placers. In time, *placer*, which was the name given by the Spaniards to the auriferous gravels of America, has become a generic term, in which all forms of deposit,

other than those occurring in veins, are popularly included."

But Congress kept up its appropriations and the government kept up its exploration and discovery of these vast mineral regions, and with the advance of time, and the increase of the mining industry, and of the knowledge of the mineral resources of the country, Congress apparently seeming to apprehend the arising of just such a question as complainant raises here, in order to set at rest forever the question, passed on May 10th, 1872 (17 St., p. 91), an act entitled "An act to promote the development of the mining resources of the United States." Sec. 1 reads as follows:

"All *valuable mineral deposits* in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, etc."

This court in *Deffeback vs. Hawke,* 115 U. S. 392, recognizes the criterion to be the value.

See, also, *Davis vs. Weibold,* 139 U. S. 507.

Now we notice the evolution. The first act in 1866 declares the mineral lands to be free and open to exploration and occupation. The amendment of 1870 provides that placers shall include "all forms of deposits," and the act of 1872 still further broadens it by using the words "all valuable mineral deposits."

The test of the character of railroad lands is the same as applied to the question between mineral and agricultural claims, viz: are they more valuable for mineral than for agricultural purposes?

See *Ivanhoe Mining Co. vs. Keystone Mining Co., Supra.*

Barringer & Adams, supra, 533, Note 2;
Barden vs. N. P. R. R. Co., 154 U. S. 288.

The Land Department, in accordance with these decisions, holds:

"The burden of proof is upon the railroad company to show the agricultural character of land that is returned as mineral by the Surveyor General."

C. P. R. R. Co., 13 L. D. 603.

Now is land valuable for its large stratas of fine granite, although there be no precious metals in it, a valuable mineral deposit? If so, then it was declared to be free and open to exploration and purchase twelve years before the definite location of the complainant's road. Sec. 6 of the act of 1872 provides for the obtaining of patents for land "claimed and located for valuable deposits." It does not say for gold, silver or other precious metals but for lands valuable for deposits, and prescribes a form of proceeding to obtain patents for lands containing valuable deposits.

But after further exploration and the increased knowledge of the mineral resources, Congress discov-

ered that large areas of land existed in Washington, Oregon, California and Nevada, some of which were chiefly valuable for their timber, some for stone, but all unfit for cultivation. It did not necessarily follow that it was building stone of an extra class but that it was more valuable for stone than for anything else, and in any event they were *unfit for cultivation.* And hence, if there ever was a doubt upon the foregoing statutes, Congress set the matter at rest by the Act of 1878 (20 Stat., p. 89), which provided for the entry and patenting of lands in the states above named chiefly valuable for their timber or stone, but *unfit for cultivation.* This was six years before the definite location of the complainant's road and it was certainly a reservation by Congress from the operation of that grant of lands in the four states mentioned valuable chiefly for timber or for stone, but *unfit for cultivation;* and hence, if there is within the limits of this grant any land *unfit for cultivation* which at the same time is chiefly valuable for timber or chiefly valuable for stone (laying aside the question of its quality as building stone or otherwise) it was reserved from the grant to the railroad company. The act of 1878 does not refer exclusively to so fine an article as building stone, but if the stone upon it is valuable for any commercial purpose, if such is its chief value and if it is unfit for cultivation, it was purchaseable under the timber and stone act of 1878.

This argument is further strengthened by consideration of the act of 1892, under which lands valuable for building stone are enterable under the placer laws. This act did not repeal the Act of 1878, but the second section of the Act of 1892 extended the Act of 1878, which by its enactment applied only to the states of Washington, Oregon, California and Nevada, to all the public land states. We have seen that lands valuable for building stone were enterable under the placer laws of 1889 prior to the passage of this act, and this act of 1892 appears to have been a Congressional disapproval of the decision heretofore mentioned of the Land Department (subsequently vacated, however), that lands valuable for building stone could not be entered under the placer act. While no kind of stone except lands valuable for building stone may be taken under the act of 1892, yet all kinds of stone, including building stone where such is the chief value of the land, could be taken under the act of 1878. It has been held, in 23 L. D. 322, a decision subsequent to the act of 1892, that:

"There can be no doubt but what land chiefly valuable for building stone could have been purchased under the Act of 1878."

Now, lands valuable for building stone can be taken either under the Act of 1878 or 1892, but if taken under the former act the applicant stands as an applicant under the Timber and Stone Act, whereas if applied for under the Act of 1892, the applicant has

all the rights of an applicant under the mineral laws, and consequently, as between two claimants under the separate acts, the mineral claimant would have superior rights. This is shown by the case of *Forsythe vs. Weingart,* 27 L. D. 680. The facts were these: Weingart, on February 19, 1896, made application under the act of 1878 to purchase certain stone lands, and made his proof. Forsythe et al., protested, alleging prior location under the placer mining laws. The local Land Office recommended acceptance of Weingart's proof under the Act of 1878, and the dismissal of Forsythe's protest. Upon appeal by the protestants, the General Land Office reversed the Local Land Office, whereupon Weingart appealed to the Interior Department. The Acting Commissioner states as follows:

"The land in question is of the character of lands which may be disposed of either under the Act of 1878 or under the placer minings laws."

He then states the proposition involved as follows:

"Weingart having applied to purchase it under the Timber and Stone Act, and Forsythe, et al., having alleged its location as a placer mining claim, the question of priority of right is presented which involves the necessity of determining whether in fact protestants have a placer mining location which embraces the land in dispute."

The Interior Department awarded the land to the claimant under the mineral laws.

Each of the acts of 1866, 1870, 1872 and 1878 was a legislative interpretation, which for all future purposes classified lands containing valuable deposits of building stone as mineral land. But it is claimed that these acts cannot have the effect of interpreting the word "mineral" as used in the Act of 1864; that the word there used must be more restricted. If a restricted meaning is to be applied, it must be by reason of the relative position of the parties, or the substance of the transaction. In considering this relative situation of the parties, and the substance of the transaction, to what point of time must we direct our attention in dealing with land grants and rights asserted under them? To the date of the passage of the act making the grant, or the time when the grantee becomes first entitled to assert a claim to a particular tract of land? Fortunately this question has been settled by the Supreme Court of the United States in the case of *Mullan vs. United States*, 118 U. S. 271. The facts in that case were these:

By the Act of March 3, 1853, the State of California was authorized to select lieu lands, or lands in lieu of such portions of the 16 and 36 sections as were theretofore lost to the state. In 1868, Mullan applied to the State Surveyor-General of California to purchase a half section of land. His application was favorably considered; in due process of time the Secretary of the Interior listed the land to the state and

Mullan received a state patent. At the time Mullan instituted the proceedings the land was notoriously coal land. This fact being brought to the attention of the government, a suit was instituted by the government to vacate the listing. It was claimed by Mullan that under the pre-emption act of 1841, the word "mines" did not include coal lands, and consequently such lands were not considered as mineral lands at the date of the lieu land act of 1853. Subsequently, however, Congress by the Act of July 1st, 1864, as we have seen, gave the legislative construction to the term which thenceforth attached to known coal beds or coal fields, and the question was whether the date of consideration of the character of the land should be the date of the passage of the law of 1853 or the date of the application for the patent. Judge Sawyer held the date to be the date of the application for the patent. The case was appealed to the Supreme Court of the United States, which affirmed this decision, summing up these views as follows:

"At the time the selection was actually made therefor, it cannot be doubted that the land was mineral land, both in law and in fact, * * * and we agree with the Circuit Court in the opinion that the *rights of the parties are to be determined by the law as it stood then.*" (Italics our own.)

Lindley in Sec. 140 says:

"The enactment of the general mining laws by Congress incorporated into the land system a new

element, announced new principles and a new policy, in the light of which all pre-existing land-grant laws to the extent that they remain unsatisfied are to be administered."

And Lindley in Sec. 154 reviews the proposition that grants of particular sections of land to the railroad company is a float, and acquires precision at the date of the definite location of the line, concerning which he says:

"While this is true as to such lands as are within the purview of the grant, it is not to be inferred that the mineral or non-mineral character of the land is to be determined as of the date of either the survey or filing the map of definite location."

And again in Sec. 159 he says:

"The question whether a given tract of land within the primary, or place, limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent."

In the *N. P. R. R. vs. Sanders*, 49 Fed. 134, the Circuit Court of Appeals used the following language:

"Much less can there be any authority or jurisdiction for construing a grant by narrowing a reservation made therein for the benefit of the people in general, by ascribing to it a meaning different from anything which its words express. Although there was no statute providing for the sale or bestowal of mineral lands at the time of the grant to plaintiff,

Congress had the right to and did afterwards make such a law, and under it claims could be and were lawfully initiated prior to the definite fixing of the line of plaintiff's road. We think that the reservations in the paintiff's grant were made in contemplation of future legislation as well as the then existing laws."

In the case of *N. P. R. R. vs. Hinchman*, 53 Fed. 526, it was held that after the withdrawal, but before definite location, where Congress passed an act providing for the disposition of a large area within the withdrawal for certain purposes, that Congress had the power to do so, and that this was an otherwise appropriating of the lands, prior to, and at the time of definite location, and that "in the very grant to the N. P. R. R. the right was reserved to the government to reserve, sell, grant or otherwise appropriate any of the lands which might fall within the limits of the same up to the time of definite location."

"The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time. * * * The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest states, and it must be strictly construed."

Barden vs. N. P. R. R. Co., 154 U. S. 288.

In N. P. R. R. vs. Cannon, 54 Fed. 252; *N. P. R. R. vs. Barden*, 154 U. S. 330, it was held that the inquiry is directed to the present character of the

land, not to its character as of the date of the railroad grant.

These authorities are simply following the rule giving weight to the interpretation placed upon the law by the land department. That department has consistently adhered to this ruling, as will appear from the following:

"Land in reservation at the date of definite location is excepted from the terms of the grant."

A. & P. R. R. Co. vs. McCabe, 4 L. D. 94;
St. P. M. & M. Ry. Co. vs. N. P. R. R. Co., 5 L. D. 429;
S. P. R. R. Co. vs. Nimmo, 4 L. D. 100;
Sansome vs. S. P. R. R. Co., 4 L. D. 357;
Story vs. S. P. R. R. Co., 4 L. D. 397.

If this land was subject to entry under the mineral laws, existing at the date of definite location of the road, then it was not "free from other claims or rights," and it did not pass to the road.

Holmes vs. N. P. R. R., 5 L. D. 336;
McLean vs. N. P. R. R., 5 L. D. 529;
Burt vs. N. P. R. R., 3 L. D. 490;
N. P. R. R. vs. Dudden, 6 L. D. 6.

Lands reserved by the President after the grant, the reservation still being in force at date of definite location, are not "free from other claims," and are reserved, and do not pass to the road. This was a

case where lands were reserved by the President for an Indian reservation after the grant, but prior to the date of the definite location.

Jackson, Lansing & Saginaw R. R. Co., 5 L. D. 432.

The condition of the land at the date of definite location determines whether it will pass under the grant.

Cayce vs. St. L. & I. M. R. R., 6 L. D.

The status of the land at the date of the definite location of the road determines whether it will pass under the grant.

Nellson vs. N. P. R. R., 9 L. D. 402;
Showell vs. C. P. R. R., 10 L. D. 167.

The right of the United States to the land is determined by the conditon of the land at the date of the filing of the map of the definite location of the road.

Olney vs. H. & D. Ry. Co., 11 L. D. 188.

The Secretary of the Interior held in *Central Pacific R. R. vs. Valentine*, 11 L. D. 238, that the discovery of the mineral character of land at any time prior to the issuance of patent to the railroad, effectually excludes such land from the railroad grant, and said:

"All mineral lands other than coal and iron are expressly excepted from its operation."

It was held in *N. P. R. R. Co.*, 12 L. D. 572, that lands included within suspended homestead entries at the date of the definite location, is excepted from the operation of the grant. By analogy, all land of the character of the land in controversy in this case was in effect suspended from entry by the Act of 1878 if it was not considered mineral land prior to that date.

"Lands reserved for Indian reservations within the railroad limits subsequent to the granting act and prior to the date of definite location, are excluded from the grant."

A. P. N. R. R. vs. Tiernan, 17 L. D. 587;
A. P. N. R. R. vs. Willard, 17 L. D. 554.

Discovery of the mineral character of land at any time prior to the issuance of patent effectually excludes such land from the grant.

N. P. R. R. Co. vs. Champion, 14 L. D. 699.
N. P. R. R. Co., 13 L. D. 691.

Now, the stipulated facts in this case show that the line of definite location was not made until March, 1884; consequently, even admitting that "mineral lands" as used in the granting act, did not embrace lands of the character of these in controversy, it must be apparent from the foregoing decisions that the acts of 1866, 1870, 1872 and 1878, passed prior to this definite location, was a reservation or an otherwise

appropriation of these lands. Or if, as some of the foregoing authorities held, the condition of the land at the date of final survey or application for a patent is to govern, then in view of the fact that the land was not surveyed until within the past year, we think the act of Congress of 1892, providing for a patent of lands chiefly valuable for stone, can be considered as a lawful reservation or otherwise appropriation of these lands.

We conclude this branch of the discussion by the following quotation from Mr. Lindley, who, after an extensive review of the authorities, sums up the conclusion in Sec. 162 of his work as follows:

"We are authorized to deduce the following general conclusions from the foregoing exposition of the law:

"(1) That lands embraced within the primary, or place, limits of a railroad grant, whose mineral character is known or established at any time prior to the issuance of a patent are not patentable to the railroad company, and are excepted out of the grant.

"(2) Whether a given tract within either the primary or indemnity limits is mineral or not must be determined according to the state of the law and facts as they exist at the time patent is applied for or application to select is made. Until patent is issued or selections are finally approved, the Land Department retains jurisdiction to pass upon the character of the land; and its judgment, culminating in the issuance of a patent or final approval of a selection, is conclusive, and not open to collateral attack.

"(3) The term 'mineral land,' as used in the reservation clauses of railroad grants, includes all val-

uable deposits, metallic and non-metallic, which are or may be subject to entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservations.

"(4) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification, belong to the public domain, and are open to exploration and purchase under the mining laws, the same as any other public mineral lands."

III.

But we contend that, irrespective of all that has been said, the appellant has no standing in court, and cannot be heard to urge the invalidity of appellee's patent.

The stipulated facts in this case show that application for patent was made in due form, and due notice given, that the complaint made no appearance, objection or contest. We think, under the authorities, it now has no standing in this Court. It was held in *N. P. R. R. vs. Cannon*, 54 Fed. 257, as follows:

"Appellant was charged with knowledge of the notice which the mineral applicant was required to give by general publication and by the posting of notices upon the claim, and of the notices required to be given by the Land Department, and, having failed to file any contest against defendants' application, the question thereafter—as to the character of the land, whether mineral or not—became a matter between the defendants and the government of the United States. That question is one which required the exercise of judicial power and discretion upon the part of the of-

ficers of the Land Department, and their judgment thereon is not open to review in an action of the character made out by appellant's bill."

The patent has been issued in this case as mineral land. That is conclusive in this controversy, against the complainant, by the fact that no adverse claim was asserted by it to the appellee's application for a patent of the premises as such ground.

That question is not now open to litigation.

Dahl vs. Raunheim, 132 U. S. 263;
Eureka Mining Co. vs. Richmond Mining Co., 4 Sawyer, 302.
Hamilton vs. Mining Co., 33 Fed. 562.
Seymour vs. Fisher, 16 Colo. 188.
Barringer & Adams on the Laws of Mines and Mining in the United States, 382-388, 394, 416;
Gustavus vs. Hagland, 1 L. D. 591;
Wight vs. Tabor, 2 L. D. 738;
28 L. D. 322.

This proposition, it seems to us, has become elementary, and we will not prolong this discussion with further citations.

We ask that the judgment of the Lower Court be affirmed.

Respectfully submitted,

J. T. RONALD,

Solicitor for Appellee.